

complete, accurate, and timely reports on the service usage of competing carriers' customers; and (2) complete, accurate, and timely wholesale bills.²⁹⁴ Service-usage reports and wholesale bills are issued by BOCs to competitive LECs for two different purposes. Service-usage reports generally *are* issued to competitive LECs that purchase unbundled switching and measure the types and amounts of incumbent LEC services that a competitive LEC's end users use for a limited period of time (usually one day).²⁹⁵ In contrast, wholesale bills are issued by incumbent LECs to competitive LECs to collect compensation for the wholesale inputs, such as unbundled network elements, used by competitive LECs to provide service to their end users.²⁹⁶ These bills are usually generated on a monthly basis, and allow competitors to monitor the costs of providing service.²⁹⁷

89. We find that Pacific Bell complies with its obligation to provide complete, accurate and timely reports on service usage. Pacific Bell provides competitive carriers with daily usage files (DUFs), which allow competitive carriers access to usage records, including end-user, access and interconnection records.²⁹⁸ No commenting parties raise any issues with Pacific Bell's provision of service usage data to competitive LECs. Based on the information provided by Pacific Bell, we find that its provision of service usage data through the DUF meets its obligations in this regard.

90. We also find that Pacific Bell demonstrates that it is providing carrier bills in a timely manner.²⁹⁹ For competitive LECs that are reselling services, Pacific Bell uses the Customer Record Information System (CRIS), which is the same system Pacific Bell uses for its retail customers.³⁰⁰ Pacific Bell uses its Carrier Access Billing System (CABS) to bill competitive carriers for UNE and interconnection products, including loops, switch ports, loop and port combinations, local transport and interconnection.” We note that no party challenges the timeliness of Pacific Bell's wholesale bills in California. Several parties, however, dispute

²⁹⁴ *Verizon New Jersey Order*, 17 FCC Rcd at 12333, para. 121

²⁹⁵ *Verizon New Jersey Order*, 17 FCC Rcd at 12333, para. 121

²⁹⁶ *Verizon New Jersey Order*, 17 FCC Rcd at 12333, para. 121

²⁹⁷ *Verizon New Jersey Order*, 17 FCC Rcd at 12333, para. 121

²⁹⁸ Pacific Bell Application App. A, Vol. 1, Affidavit of Michael E. Flynn (Pacific Bell Flynn Aff.) at para. 10. Competitive LECs can use the DUFs to: (1) bill their end-user customers; (2) bill interconnecting carriers; and (3) reconcile their wholesale bills. Competitive LECs may elect to have their DUF delivered electronically, or via Magnetic Tape, and have the option of receiving their DUF file on a daily, weekly or monthly basis. Pacific Bell Flynn Aff. at para. 10.

²⁹⁹ See Pacific Bell Johnson Aff at para. 88-95; See also Appendix B, PM 28 (Usage Timeliness), PM 30 (Wholesale Bill Timeliness).

³⁰⁰ Pacific Bell Flynn Aff. at para. 4.

³⁰¹ Pacific Bell Flynn Aff. at para. 5

Pacific Bell's ability to provide complete, accurate, and auditable wholesale bills and contest the effectiveness and timeliness of Pacific Bell's dispute resolution process. To demonstrate the accuracy of its bills, Pacific Bell provides evidence of the third-party test, which determined that Pacific Bell provides competitive LECs with accurate electronic and hard copy bills.³⁰² In addition, Pacific Bell notes that its performance data reveal that its wholesale bills are sufficiently accurate.” While we acknowledge that competitive carriers have identified problems with Pacific Bell's bills, we conclude, as did the California Commission, that Pacific Bell's wholesale bills provide competitive LECs in California with a meaningful opportunity to compete.³⁰⁴ As the Commission has previously stated, “we recognize, as a practical matter, that high-volume, carrier-to-carrier commercial billing cannot always be perfectly accurate.”” Many of the problems identified by commenters appear to be resolved historical problems, and even in the aggregate, these claims do not overcome Pacific Bell's demonstration of checklist compliance. We address the claims more fully below.

91. *Accuracy of Dora.* Several commenters question the accuracy of the data underlying Pacific Bell's performance measurements relating to billing accuracy. Both Vycera and Telscape claim that, in their experience, Pacific Bell's bills contain many more errors than is reflected by the performance measurements, which demonstrate billing accuracy rates of close to one hundred percent.³⁰⁶ The commenters suggest that the reason for the discrepancy between

³⁰² TAM Final Repon at 31. The third-party test evaluated Pacific Bell's CABS system and determined that Pacific Bell supplied competitive LECs with accurate and timely electronic and hard copy bills.

³⁰³ Pacific Bell met the parity standard for all services for every month from May to September 2002 for almost all of the billing performance measurements that impact billing accuracy. Pacific Bell Johnson Aff. at paras. 94-95; *see also* Appendix B, PM 31 (Usage Completeness), PM 33 (Non Recurring Charge Completeness), and PM 34 (Bill Accuracy). The only performance measurement for which Pacific Bell did not meet parity each month was the measure regarding the completeness of recurring charges, and even in that instance, Pacific Bell only missed parity for one month for one service and two months for another service. *See* PM 32 (Recurring Charge Completeness). Pacific Bell did not meet parity in May 2002 and September 2002 for recurring charge completeness for its UNE POTS services. *See* PM 32-3200300. However, the disparity was less than eight percent in May and less than one percent in September. Moreover, on average for the five-month period, Pacific Bell's recurring charge completeness for UNE POTS services was 94.89 percent, while it was only 92.82 percent for its retail customers. Pacific Bell also failed to meet the parity standard in July 2002 for recurring charge completeness for competitive LEC resale customers. *See* PM 32-3200200. However, in this instance, even for the month that Pacific Bell missed, the difference was very small—93.11 percent for competitive LEC customers and 94.09 for Pacific Bell retail customers. Moreover, on average during the five-month period evaluated, Pacific Bell performed slightly better for competitive LEC customers, than its own retail customers.

³⁰⁴ The California Commission found that Pacific Bell's billing systems achieved a substantial state of parity. In addition, the California Commission noted that it had incentives in place to help assure that Pacific Bell does not backslide in its performance. *California Commission Order* at 64.

³⁰⁵ *Verizon New Jersey Order*, 17 FCC Rcd at 12336-37, para. 126.

³⁰⁶ Letter from Patrick J. Donovan, Rogena Harris and Katherine A. Rolph, counsel for Vycera, to Marlene H. Donch, Federal Communications Commission, WC Docket No. 02-306 at 1 (filed Oct. 25, 2002) (Vycera Oct. 25 *Ex Parte* Lener); Letter from Rogena Harris and Katherine A. Rolph, counsel for Vycera, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 02-306 at 1-2 (filed Nov. 4, 2002) (Vycera Nov. 4 *Ex Parte* Letter); (continued..)

their first-hand experience with Pacific Bell's bills and the performance results could be that Pacific Bell has failed to include various credits in its performance data." For instance, Vycera explains that once Pacific Bell agrees to credit an account, the credit simply shows up as a general credit to the bill as a whole, and does not specify to which charges or accounts the credit relates.³⁰⁸ Vycera notes that this manner of issuing credits might exclude those credits from the performance measurements.³⁰⁹ Vycera also suggests that Pacific Bell's billing accuracy measurements may understate the credits that should be issued because Pacific Bell will only issue a credit if it is demanded by the competitive LEC, even if it knows a credit is due to other similarly-situated competitive LECs.³¹⁰ Similarly, Telscape claims that bill credits offered by Pacific Bell through certain settlement agreements are excluded from the performance measurements, which could understate the number of credits given to competitive LECs."

92. In response, Pacific Bell explains that all bill adjustments are reflected in its performance measurements." Pacific Bell also states that when it learns of systems-related billing errors that could impact more than one competitive LEC, Pacific Bell's practice is to make those adjustments for all impacted competitive LECs—not just the competitive LEC that called the error to Pacific Bell's attention." Pacific Bell concedes that its data have understated billing adjustments in recent months in one regard, but argues that the impact was minimal. Specifically, Pacific Bell admits that manual billing adjustments made to the Enhanced Summary Billing Account (ESBA) statement (which is the bill as a whole, instead of the sections relating to an individual telephone number), must be added manually to the billing accuracy performance measurement (PM 34) results. For the five-month data period at issue those ESBA credits were apparently not provided to the performance measurement group, and were therefore not included

(Continued from previous page)

Lener from Ross A. Buntrock, counsel for Telscape, to Marlene H. Donch, Federal Communications Commission, WC Docket No. 02-306 at 2 (filed Nov. 1, 2002) (Telscape Nov. 1 *Ex Parte* Letter).

³⁰⁷ See Vycera Nov. 4 *Ex Parte* Lener at 2; Telscape Nov. 1 *Ex Parte* Letter at 2-3

³⁰⁸ Vycera Oct. 25 *Ex Parte* Lener at 1

³⁰⁹ Vycera Oct. 25 *Ex Parte* Letter at 1

³¹⁰ Vycera Nov. 4 *Ex Parte* Lener at 2.

³¹¹ Telscape Nov. 1 *Ex Parte* Letter at 2-3; Telscape Reply at 4-5.

³¹² Pacific Bell states that the bill adjustments are reflected in either performance measurement 33 (non-recurring Charge Completeness) or in performance measurement 34 (Billing Accuracy). Pacific Bell explains that if the credit is a mechanized adjustment to correct a billing system error, the credit would appear as a one-time credit to nonrecurring charges and would be reported in performance measurement 33. Pacific Bell further explains that if the credit is a manual adjustment, for instance, an agreement reached with an individual competitive LEC that is not a billing system error, those credits would appear in the adjustment section of the bill and be reported in performance measurement 34. Pacific Bell Reply Affidavit of Michael E. Flynn, Ginger L. Henry and Gwen S. Johnson, Tab 5 (Pacific Bell Flynn/Henry/Johnson Reply Aff.) at paras. 41-42.

³¹³ Letter from Colin S. Stretch, counsel for Pacific Bell, to Marlene H. Donch, Federal Communications Commission, WC Docket No. 02-306, Attach., at 1 (filed Nov. 26, 2002) (Pacific Bell Nov. 26 *Ex Parte* Lener).

in the reported data.”³¹⁴ While this oversight slightly impacted the performance results, Pacific Bell states that the total adjustments made during the five-month data period including the ESBA adjustments amounted to less than 0.3 percent of resale billing and less than 0.04 percent of total CRIS and CABS wholesale billing.³¹⁵ Even including those additional billing credits, Pacific Bell still demonstrated billing accuracy of over 99 percent for June, July, and **August** 2002, over **98** percent for May 2002 and approximately 93.5 percent for September 2002.³¹⁶ Moreover, Pacific Bell has taken steps to ensure that these billing adjustments are included in the performance measurements in the future.”³¹⁷ Pacific **Bell** also admits that it has entered settlement agreements with competitive LECs that, among other things, exclude certain billing credits from reported performance measurements.³¹⁸ Pacific Bell explains, however, that a decision to exclude certain credits from performance measurements would only be made by mutual agreement of the parties.³¹⁹ Based on the record, we do not find that Pacific Bell’s billing adjustments in any settlement agreement merit a finding of checklist noncompliance. Moreover, because we encourage the settlement of disputes, we do not consider it necessarily improper for parties to agree to compromise or settle billing disputes such that payments are not reflected in performance data. Accordingly, even taking into account these accuracy issues, we do not find that Pacific Bell’s performance warrants a finding of checklist noncompliance. We will monitor Pacific Bell’s performance in this area for compliance with the conditions of approval in this order.

93. *Auditable Bills.* Pacific Bell provides competing carriers in California the opportunity to receive their bills in paper format, electronic media, or both.³²⁰ Electronic CABS bills follow the industry standard Billing Output Specification (BOS) guidelines, while CRIS bills also follow industry standards.”³²¹ Several competitive LECs generally claim that Pacific Bell’s wholesale bills are difficult to decipher and, therefore, are unauditable.³²² Specifically, Mpower provides two examples for which it claims that Pacific Bell fails to provide sufficient information to audit its bills. First, Mpower argues that Pacific Bell’s wholesale bills do not

³¹⁴ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 42.

³¹⁵ Pacific Bell Nov. 13 *Ex Parte* Letter, Attach. at 3.

³¹⁶ Pacific Bell Nov. 13 *Ex Parte* Letter, Attach. at 3.

³¹⁷ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 42; *see also* Letter from Colin S. Stretch, counsel for Pacific Bell, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 02-306, Attach. 1 (filed Nov. 21, 2002) (Pacific Bell Nov. 21 *Ex Parte* Letter).

³¹⁸ Pacific Bell Flynn/Henry/Johnson Reply AM at para 40 n.10.

³¹⁹ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 40 n.10.

¹²⁰ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 7.

³²¹ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 7.

³²² Mpower Comments at 5; Telscape Reply at 3; Vycera Comments at 10-11.

identify loops by “CLLI code,” which makes it very difficult to verify the zones in which the loops are located and thus, the appropriate rate.”] Second, Mpower claims that Pacific Bell fails to provide sufficient information to audit end-user return charges.”³²³ In responding to Mpower’s first claim, Pacific Bell counters that it does provide CLLI codes in both its paper and electronic bills for Mpower’s loops and provides an excerpt of Mpower’s bills to illustrate the information it provides.”³²⁴ With regard to the second issue, Pacific Bell explains that before any loop is disconnected as part of an end-user return, the competitive LEC must send a FOC to Pacific Bell to submit the disconnect order on the competitive LEC’s behalf.”³²⁵ Pacific Bell contends that Mpower can reconcile its billing by comparing the information provided on its FOC to the purchase order number (PON) and/or the circuit identification information provided on the bill.³²⁷ Because the competitive LECs’ general contentions of difficulty auditing Pacific Bell’s bills lack any specific evidence substantiating their claims, we reject these claims. With regard to Mpower’s specific bill auditing issues, we determine that Pacific Bell does provide sufficient information for Mpower to audit the charges it identifies and, accordingly, we reject Mpower’s claims as well.³²⁸

94. *Allegations of Specific Billing Errors.* Mpower, Vycera and Telscape claim a host of specific Pacific Bell billing mistakes and other disputes between the parties.” We recognize that billing errors such as these can be time-consuming and costly for competing LECs to identify and resolve, particularly if they occur frequently. We do not **find** in this instance, however, that

³²³ Mpower Comments at 5-6; Letter from Marilyn H. Ash, Counsel — Legal & Regulatory Affairs, to Michael Powell, Chairman, Federal Communications Commission, WC Docket No. 02-306, Anach., Affidavit of Mark S. Kazmierski at paras. 4-5 (filed Oct. 21, 2002) (Mpower Kazmierski Aff.). The CLLI Code (Common Language Location Identifier) identifies the central offices where the loops terminate.

³²⁴ An end-user return is when the end user must be disconnected from the competitive LEC, because it has selected Pacific Bell as its local carrier. Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 22.

³²⁵ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para 10, Attach. A; **see also** Pacific Bell Nov. 26 *Ex Parte* Letter, Attach., at 3-5.

³²⁶ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 23

³²⁷ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 23

³²⁸ With regard to the CLLI Code claim, although Mpower claims that such information is not included in Pacific Bell’s electronic bills, we note that Pacific Bell has provided an excerpt from Mpower’s bills illustrating that such information is included in both the electronic and paper version of its bills. Pacific Bell Nov. 26 *Ex Parte* Lener. Attach. at 3-5. With regard to the end-user return claim, Mpower concedes that it could verify the charges with its FOC records, but instead claims that such a procedure would be cumbersome. Lener from Marilyn H. Ash, Counsel — Legal & Regulatory Affairs, to Michael Powell, Chairman, Federal Communications Commission, WC Docket No. 02-306, Attach., Supplemental Affidavit of Scott Sarem at para. 12 (filed Nov. 19, 2002) (Mpower Sarem Supplemental Aff.).

³²⁹ *See, e.g.*, Mpower Comments at 5-7; Vycera Comments at 10-11; Letter from Ross A. Buntrock, counsel for Telscape, to Marlene H. Donch, Federal Communications Commission, WC Docket No. 02-306 at 2-3 (filed Oct. 18, 2002) (Telscape Oct. 18 *Ex Parte* Lener); **see also** Telscape Reply at 2-5.

these specific billing claims warrant a finding of checklist noncompliance. Indeed, the vast majority of the billing disputes these commenters raise are historical problems, for which Pacific Bell already has issued the appropriate credits.” We determine that, the majority of these issues have been resolved, and Pacific Bell’s errors appear to represent isolated instances, and are not indicative of a systemic problem with Pacific Bell’s billing systems.³³¹ The commenters identify additional billing disputes, for which Pacific Bell investigated the dispute and determined that either no billing credit was due, or the credit already provided was correct.³³² Again, these disputes appear to be isolated instances that do not reflect systemic problems with Pacific Bell’s billing. Moreover, commenters did not provide sufficient information to rebut Pacific Bell’s response that it took appropriate action with regard to these disputes. Finally, we note that commenters raise other disputes with Pacific Bell that have little relevance to the effectiveness of Pacific Bell’s billing systems.” Because we determine that these issues fail to demonstrate any competitively significant issue with regard to Pacific Bell’s billing systems, we reject these claims as well.

³³⁰ For example, Mpower and Telscape both claim that Pacific Bell inappropriately charged competitive LECs the manual rate for disconnection of the end user from the competitive LEC when the end user selects Pacific Bell as its local carrier. Mpower Comments at 6; Telscape Oct. 18 *Ex Parte* at 3. Telscape also claims that Pacific Bell: (1) mistakenly charged deaveraged loop rates when it should have been charged average loop rates; and (2) erroneously charged the semi-mechanized rate for Universal Lifeline Telephone Service Migrations. Telscape Oct. 18 *Ex Parte* Letter at 3; *see also* Letter from Ross A. Buntrock, counsel for Telscape, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 02-306, Attach. at 9 (filed Oct. 24, 2002) (Telscape Oct. 24 *Ex Parte* Letter). Vycera claims that Pacific Bell: (1) charged incorrect tariff rates for certain services; (2) erroneously billed for anonymous call rejection, which is a free service; (3) double billed for custom calling services for single-line accounts; and (4) failed to apply the resale discount for certain services. Vycera Comments at 11. For most of these issues, Pacific Bell has already fully resolved the disputes by issuing appropriate credits. Pacific Bell Flynn/Henry/Johnson Reply Aff. at paras. 17-18, 22, 24, 28-35. For certain of Vycera’s billing disputes, Vycera claimed that the credits were not sufficient, and Pacific Bell has agreed to determine whether additional credits are required. Letter from Colin S. Stretch, counsel for Pacific Bell, to Marlene H. Dortch, Federal Communications Commission, WC Docket No. 02-306, Attach. 1, at 3 (filed Dec. 13, 2002) (Pacific Bell Dec. 13 *Ex Parte* Letter).

³³¹ *See* Appendix B; Pacific Bell Johnson Aff. at paras. 88-95.

³³² For instance Mpower claims that Pacific Bell: (1) charged the incorrect zone rate for thousands of loops; (2) failed to accurately apply the credit for deaveraged loop rates; (3) incorrectly charged for disconnected lines; and (4) incorrectly charged manual service charges for faxing orders. Mpower comments at 5-6. Telscape also argues that Pacific Bell: (1) incorrectly charged a semi-mechanized rate for internal migrations from UNE-P to UNE-L; and (2) bills frivolous late charges. Telscape Oct. 18 *Ex Parte* Letter at 2-3. For these billing disputes, Pacific Bell either investigated the dispute and determined that they had accurately billed the charge or applied the credit, or Pacific Bell determined (as was the case with Telscape’s claim of incorrect late charges) that it had insufficient information to appropriately investigate the claim, Pacific Bell Flynn/Henry/Johnson Reply Aff. at paras. 9-11, 14-15, 19-21, 27.

³³³ For instance, Mpower raises a current dispute it is having with Pacific Bell over maintenance and repair charges in its interconnection agreement. Mpower Comments at 6. Similarly, Vycera claims that on some occasions, Pacific Bell would not properly switch a customer to Vycera’s network for intra-LATA toll calls, which caused Vycera to incur Pacific Bell wholesale charges. Vycera Comments at 11. We determine that neither of these claims relate specifically to Pacific Bell’s billing systems and therefore, this is not the proper forum to address these issues.

95. *Dispute Resolution Process.* Mpower, Vycera and Telscape all generally complain that Pacific Bell's dispute resolution process is cumbersome and fails to provide timely corrections of billing errors.³³⁴ Mpower further alleges that Pacific Bell has been using anticompetitive collection tactics — withholding payment owed to Mpower — because of disputes Mpower raised regarding Pacific Bell's bills.³³⁵ In response, Pacific Bell states that its billing dispute resolution process is well documented and is set out in detail in the Pacific Bell/Nevada Bell CLEC Handbook.³³⁶ Pacific Bell claims that the CLEC Handbook provides detail on how to submit a billing dispute, instructions for completing the standard dispute form, a general timeline for dispute resolution, and escalation procedures in the event the competitive LEC is not satisfied with the result of Pacific Bell's investigation.³³⁷ Pacific Bell also explains that this process was developed with competitive LEC input through workshops and billing forums conducted by the California Commission as part of the section 271 collaborative process.³³⁸ With regard to Mpower's claims of anticompetitive collection tactics, Pacific Bell counters that Mpower undisputedly owes Pacific Bell many times the amount Pacific Bell undisputedly owes Mpower. Pacific Bell, nonetheless, claims that it and Mpower are taking steps to resolve their billing issues and Pacific Bell has paid Mpower undisputed reciprocal compensation payments with the understanding that Mpower will likewise release all undisputed funds owed to Pacific Bell and will escrow all disputed funds.³³⁹ Mpower has not countered Pacific Bell's explanation. Based on the evidence in the record with regard to Pacific Bell's dispute resolution process and conduct, including the acknowledgement of the commenters that Pacific Bell has indeed issued credits to resolve errors, we determine that Pacific Bell's dispute resolution process enables competing carriers to correct billing mistakes in a manner that allows them a meaningful opportunity to compete. We further reject Mpower's claims regarding Pacific Bell's tactics, as it appears from the record that the amounts in question have been paid.

f. Change Management and Technical Assistance

96. *Change Management.* We conclude that Pacific Bell demonstrates that it satisfies checklist item 2 regarding change management.³⁴⁰ In addition, Pacific Bell has shown that it uses

³³⁴ Mpower Comments at 6-7; Telscape Reply at 3-4; Vycera Comments at 11.

³³⁵ Mpower Comments at 7-8.

³³⁶ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 13.

³³⁷ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 13. Pacific Bell also explains that in certain instances, due to the complexity of certain billing disputes, and the requisite research and system changes that need to occur to resolve the dispute, some disputes take a substantial amount of time to resolve. *See* Pacific Bell Nov. 13 *Ex Parte* Letter, Attach. at 4.

³³⁸ Pacific Bell Flynn/Henry/Johnson Reply Aff. at para. 13.

³³⁹ Pacific Bell Reply Affidavit of Colleen L. Shannon, Tab 14 (Pacific Bell Shannon Reply Aff.) at paras 20-21.

³⁴⁰ *See* Pacific Bell Application at 49; Pacific Bell HustodLawson Aff. at paras. 222-30.

the same change management process in California as in SBC's wider thirteen-state region, including the previously-approved change management process found in the five-state SWBT region.³⁴¹ We are thus able to conclude that Pacific Bell's change management process provides the documentation and support necessary to provide competitive LECs nondiscriminatory access to Pacific Bell's OSS.³⁴² We also conclude, as did the California Commission,³⁴³ that Pacific Bell demonstrates that it provides competitors access to a stable test environment that mirrors its production environment.³⁴⁴

97. Based on the record, we reject AT&T's arguments that Pacific Bell's test environment does not mirror its production environment.³⁴⁵ We note that AT&T alleges various shortcomings in the test environment, but we conclude that no widespread problems exist that would undermine a carrier's ability to test new and existing OSS. First, AT&T alleges that Pacific Bell's test environment does not allow AT&T to determine whether a particular end user is in Pacific Bell's "Northern" or "Southern" region – a distinction that is important because AT&T must use a different BAN for each region.³⁴⁶ AT&T explains that this deficiency makes it difficult to submit successful orders in production for end users in two California LATAs that overlap both regions.³⁴⁷ While AT&T recognizes that it will receive a rejection in the test environment when it submits an order that carries the wrong BAN, it is still dissatisfied and suggests that a proper test environment should enable it to "submit the order through Pacific

³⁴¹ Pacific Bell Application at 49; Pacific Bell Huston/Lawson Aff. at paras. 222-30. *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 6318, para. 166 (2001); *SWBT Texas Order*, 15 FCC Rcd. at 18403, para. 105 (2000).

³⁴² *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 6318-19, para. 167; *SWBT Texas Order*, 15 FCC Rcd. at 18409-20, paras. 116-134. In Texas, we concluded SWBT's change management process was adequate, based on, *inter alia*, the "go/no go" vote process, adequate documentation, compliance with documented procedures, and the testing environment. *Id.*

³⁴³ California Commission Order at 77

³⁴⁴ *See* Pacific Bell Application at 50; Pacific Bell Huston/Lawson Aff. at paras. 224, 242-45, 251-53; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 6318-19, paras. 167-68. *See also BellSouth Georgia/Louisiana Order*, 17 FCC Rcd. at 9124-25, para. 187 (2002); *SWBT Texas Order*, 15 FCC Rcd. at 18419, para. 132. As we have indicated in prior orders, a stable testing environment – one that mirrors the production environment and is physically separate from it – is a fundamental part of the change management process, ensuring that competitors can interact smoothly with the BOC's OSS, particularly in adapting to interface upgrades. *Id.* When the test environment mirrors the production environment, the BOC avoids the situation where a competitor's transactions succeed in the testing environment but fail in production. *Id.*

³⁴⁵ *See* AT&T Comments at 40-41

³⁴⁶ *See* AT&T Comments at 40; AT&T Reply Comments at 20.

³⁴⁷ AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at paras. 44-49. AT&T argues that this limitation impairs the production environment because AT&T must conduct extensive systems testing during production. AT&T Comments at 41

[Bell]]’s systems *without* rejection, on the first try.”³⁴⁸ However, Pacific Bell points out that with only two possible BANs, a reject in the test environment should permit AT&T to determine the correct BAN for a specific address.” We find this explanation to be reasonable, and find that the test environment does, in this manner, provide AT&T information relating to BANs. Moreover, we note that AT&T need not rely exclusively on testing to determine the appropriate BAN for each customer, because this information is available from Pacific Bell through its “Enhanced Verigate User Guide,” which, according to Pacific Bell, would indicate – in “Street Address Guide Abbreviation” (**SAGA**) information – whether AT&T should use the Northern system or the Southern system for a particular city of residence.³⁵⁰ For these reasons, we do not find that this alleged deficiency in Pacific Bell’s test environment has an impact on AT&T that is competitively significant,” and thus we find that Pacific Bell’s test environment satisfies the requirements of this checklist item.

98. We also reject AT&T’s argument that, because AT&T was unable to identify two types of problems during testing that later arose when it began submitting real orders to migrate existing UNE-P customers to UNE Loop service, Pacific Bell’s test environment is flawed.³⁵² AT&T argues that when it submitted orders containing customer directory listing information, the orders were accepted in the test environment, but similar migration orders were rejected when AT&T began submitting them in production in early November 2002.³⁵³ AT&T also argues that when it submitted orders to migrate UNE-P POTS customers to xDSL UNE Loop service with LNP, on one LSR, these orders were accepted in the test environment but similar orders were rejected in production.³⁵⁴ We do not find that these concerns demonstrate any widespread problem with Pacific Bell’s test environment. With regard to the first problem, we find that the parties failed to account for directory listing information when they jointly established the test

³⁴⁸ AT&T Reply Comments at 20 (emphasis in original).

³⁴⁹ Pacific Bell HustodLawson Reply Aff at para. 47. *See* Pacific Bell Huston/Lawson Aff. at para. 245.

³⁵⁰ Pacific Bell HustodLawson Reply Aff. at para. 49; Pacific Bell Dec. 6 *Ex Parte* Letter, Attach. at 2. Pacific Bell indicates that this is the same information made available to its retail representatives for use in making this determination. Pacific Bell Dec. 6 *Ex Parte* Letter, Attach. at 2. AT&T makes various general assertions that this BAN information is “poorly documented and not easily obtained” and suggests that the Verigate User Guide is an “unrealistic and unreasonable” solution. *See* AT&T Comments at 41; AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at paras. 45, 48-49. AT&T does not explain *why* this is so and does not demonstrate that Pacific Bell fails to provide nondiscriminatory access to information relating to BANs.

³⁵¹ Indeed, AT&T does not disclose how many of its rejects, if any, are attributable to a BAN mismatch problem that could have been detected through testing.

³⁵² *See* AT&T Reply Comments at 21; Letter from Richard E. Young, Counsel to AT&T, to Marlene H. Donch, Secretary, Federal Communications Commission, WC Docket No. 02-306 (filed December 10, 2002) (AT&T Dec. 10 *Ex Parte* Letter).

³⁵³ AT&T Reply Comments at 21

³⁵⁴ *See* AT&T Dec. 10 *Ex Parte* Letter at 2-3.

plan for UNE-P to WE-Loop migrations.”” With regard to the second problem as well, we find that there was confusion as to what specific type of UNE-P to UNE-Loop conversion orders AT&T planned to submit in the test environment, and whether those orders could successfully be submitted using one LSR.³⁵⁶ We recognize that establishing a test environment that mirrors production requires careful coordination and communication between the BOC and the competitive LEC community, and we expect BOCs to provide clear written direction and competent staff to ensure that the tests are set up correctly and produce reliable results. Notwithstanding the problems that have arisen with the test scenario identified by AT&T, however, Pacific Bell notes that its test environment processed more than 2,600 test case LSRs this year, and that AT&T was the only commenter to raise a complaint here.³⁵⁷ The record reflects that Pacific Bell works closely with competitive LECs to establish and process accurate and clear test scenarios, pursuant to a process defined by extensive written documentation. Viewing the totality of the circumstances, we find that Pacific Bell’s test environment affords competitors an adequate opportunity to compete.

99. Finally, we reject AT&T’s argument that it cannot adequately test Pacific Bell’s “versioning” policy, under which Pacific Bell supports multiple versions of its EDI software in order to ease competitors’ transition from older versions of the software to newer versions.³⁵⁸ Specifically, AT&T argues that Pacific Bell’s test environment does not permit AT&T to

³⁵⁵ Pacific Bell failed to appreciate that AT&T planned to migrate customers with existing main directory listings, and AT&T realized only after production problems arose that Pacific Bell’s business rules reject migration orders when they contain directory listing information. See Pacific Bell Nov. 13 *Ex Parte* Letter at 5; AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at paras. 54-57; AT&T Reply Comments at 21. While not pertinent to our conclusions, we note that Pacific Bell has implemented an “enhancement” to the EDI, effective November 13, 2002, that will ensure AT&T would no longer receive a reject notice for migrations either in the test environment or in production. Pacific Bell Nov. 13 *Ex Parte* Letter at 5.

³⁵⁶ See Letter from Colin S. Stretch, Counsel to Pacific Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-306 (filed December 13, 2002) (Pacific Bell Dec. 13 *Ex Parte* Letter), Attach. 1 at 2-3; AT&T Dec. 10 *Ex Parte* Letter at 2-3; Letter from Richard E. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-306 (filed December 17, 2002) at 1-2, Attach. 1. Pacific Bell’s analysts failed to recognize that AT&T’s test orders sought xDSL UNE Loop service and that this type of order should be submitted through two LSRs. See Pacific Bell Dec. 13 *Ex Parte* Letter), Attach. 1 at 2-3.

³⁵⁷ Pacific Bell Dec. 13 *Ex Parte* Letter, Attach. 1 at 2.

³⁵⁸ See AT&T Comments at 41; Pacific Bell Huston/Lawson Aff. at paras. 224, 242-45, 251-53. Pacific Bell first implemented a versioning policy in California in August 2000, supporting two versions of software for EDI ordering and EDI and CORBA pre-ordering interfaces. This policy was subsequently expanded, and in April 2002, when version 5.0 was implemented, Pacific Bell began to support three versions of EDI software. The three current versions are 3.06, 5.00, and 5.01, the most recent of which became available on August 3, 2002. Pacific Bell Huston/Lawson Aff. at paras. 235 n.97, 251 n.102. Pacific Bell shows that as software upgrades are initiated, a competitor may transition its systems to these more recent software versions on its own timeframe; a competitor may continue to operate under an older version until it is retired. Pacific Bell Huston/Lawson Aff. at para. 252. Version 3.06 will remain available until it is replaced by version 6, which is scheduled to be released in June 2003. Pacific Bell Nov. 14 *Ex Parte* Letter, Attach. 3 at 1; Pacific Bell Huston/Lawson Aff. at para. 252 n.102.

determine whether, once AT&T converts to a newer version of the software, it would continue to receive responses to orders that were already submitted using the older version.³⁵⁹ Pacific Bell confirms that it enables competing carriers to continue to receive responses to orders already submitted under the superceded version of the software.³⁶⁰ AT&T has not presented evidence that contradicts Pacific Bell, or that shows AT&T has had any actual difficulty transitioning to newer software versions. The inability to independently verify that an old version of software would still be supported thus does not appear to inconvenience a competing carrier. Therefore, we conclude that Pacific Bell shows it provides an adequate “versioning” process.³⁶¹

100. *Training, Technical Assistance, and Help Desk Support.* We conclude that Pacific Bell demonstrates that it provides technical assistance and help desk support necessary to permit competing carriers nondiscriminatory access to Pacific Bell’s OSS. Pacific Bell shows that several organizations that perform support functions in California also perform them across SBC’s thirteen-state region, including states that the Commission has found satisfy the requirements of Section 271.³⁶² In addition, Pacific Bell’s operations include support organizations specific to the Pacific Bell/Nevada Bell regions. These include a Local Service Center (LSC) and a Local Operating Center (LOC), which provide competitors with a single point of contact for various OSS functions.³⁶³ We find that Pacific Bell provides efficient competitors a meaningful opportunity to compete by enabling them to understand how to implement and use all of the OSS functions available to them.

101. We reject AT&T’s argument that Pacific Bell is not providing competitive LECs with the assistance they need to use available OSS functions. AT&T offers several arguments, all directed against the allegedly poor performance of one of Pacific Bell’s support centers, the

³⁵⁹ AT&T Comments at 41

³⁶⁰ Pacific Bell/Huston/Lawson Aff. at paras. 50-51; Pacific Bell Nov. 14 *Ex Parte* Letter, Attach. 3 at I. If a competing carrier transitions to a new software version at the scheduled time for release of that new version, responses to orders that had already been placed would be received under the new software. By contrast, if a competing carrier transitions to new software on its own timeframe – rather than at the time the new software is released – responses to orders that had already been placed would be received under the superceded version. Pacific Bell Nov. 14 *Ex Parte* Letter, Attach. 3 at I

³⁶¹ Pacific Bell Application at 49-50; Pacific Bell/Huston/Lawson Aff. at paras. 224, 242-45, 251-53. See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 63 18-19, paras. 167-68.

³⁶² Pacific Bell Application at 47-48; Pacific Bell/Huston/Lawson Aff. at paras. 83-99. These organizations include an Account Team SBC has established for each competitive LEC, SBC’s competitive LEC OSS Training Organization, SBC’s Information Services (IS) Call Center, SBC’s Mechanized Customer Production Support Center (MCPSC), and SBC’s OSS competitive LEC Support Team. *Id.*

³⁶³ Pacific Bell/Huston/Lawson Aff. at para. 83. In particular, the LSC provides a central point of contact for pre-ordering, ordering, and billing of interconnection facilities, resale services, and UNEs. Pacific Bell/Henry Aff. at para. 6. The LOC serves a similar function for provisioning and maintenance and repair of interconnection facilities, resale services, UNEs, and LNP. Pacific Bell/Cusolito Aff. at para. 3.

Mechanized Customer Production Support Center (MCPSC).³⁶⁴ While the distinction between the MCPSC and the LSC appears to have created confusion on AT&T's part – leading both AT&T and Pacific Bell to complain about wasting time and resources to respond to the confusion³⁶⁵ – we do not find this confusion to be caused solely by Pacific Bell, or to undermine the overall adequacy of Pacific Bell's OSS. We urge the parties to continue working towards resolving what appears to be needless confusion about the roles of these two centers. We also note that the unreasonably long telephone “hold times” for calls to the MCPSC cited by AT&T have been eliminated in recent months.³⁶⁶ Finally, while AT&T complains that there are currently “no performance measurements in place” to monitor the MCPSC, it does not indicate what performance measurements are needed or even describe what specific areas of performance – other than “hold times” – have been problematic.³⁶⁷ We note, however, that there is an established process in California for adding new performance metrics, and AT&T apparently has recently proposed a new measure for the MCPSC through this process.³⁶⁸ We thus do not find that the absence of a special performance measurement relating to the MCPSC, or the apparent confusion surrounding the relationship between the LSC and the MCPSC, warrants a finding of checklist noncompliance.

3. UNE Combinations

102. In order to satisfy section 271(c)(2)(B)(ii), a BOC must show it provides nondiscriminatory access to network elements in a manner that allows requesting carriers to combine such elements, and that it does not separate already combined elements, except at the specific request of a competing carrier.³⁶⁹ We conclude, as did the California Commission,³⁷⁰ that Pacific Bell provides nondiscriminatory access to combinations of unbundled network elements

³⁶⁴ See AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at paras. 22-42. See also AT&T Comments at 42-43; AT&T Willard Decl. at paras. 25-31

³⁶⁵ AT&T Comments at 42-43; AT&T Willard Decl. at paras. 27-29 (arguing that the delineation of functions between the two centers is unclear and the MCPSC is slow and poorly staffed – with “hold times” exceeding one hour through June 2002 and personnel inadequately trained to answer questions); Pacific Bell Reply at 19-20; Pacific Bell Huston/Lawson Reply Aff. at paras. 6, 14-16 (arguing that any confusion has arisen from poor training by AT&T of its own personnel). Pacific Bell indicates that it has described the roles of the LSC and the MCPSC in writing – including letters disseminated to competitive LECs and the “CLEC Online Website” (specifically, the competitive LEC handbook). Pacific Bell Huston/Lawson Aff. at para. 94; Pacific Bell Huston/Lawson Reply Aff. at paras. 6-8. See AT&T Willard Decl. at para. 25.

³⁶⁶ Pacific Bell Huston/Lawson Reply Aff. at para. 11. See AT&T Comments at 42.

³⁶⁷ AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at para. 39.

³⁶⁸ AT&T November 27 Young *Ex Parte* Letter, Willard Supplemental Decl. at para. 41. See Pacific Bell Huston/Lawson Reply Aff. at para. 10.

³⁶⁹ 47 U.S.C. § 271(c)(2)(B)(ii); 47 C.F.R. § 51.313(b)

³⁷⁰ California Commission Order at 34.

(UNE combinations) in compliance with the Commission's rules. Pacific Bell demonstrates that competitive LECs may order already-combined UNE combinations, and Pacific Bell will not separate these UNE combinations unless requested to do so by the competitive LEC.³⁷¹ Pacific Bell also shows that, in accordance with its interconnection agreement with AT&T, Pacific Bell combines UNEs, including new UNE-P combinations and enhanced extended links, for AT&T when requested.” For competitive LECs that choose to combine their own UNE combinations, Pacific Bell shows it provides UNEs in a manner that permits competitive LECs to combine them.”

103. We reject AT&T's claims that Pacific Bell does not comply with the Commission's requirements regarding “new” UNE combinations.³⁷⁴ AT&T notes that Pacific Bell has invoked the “change of law” provision of its interconnection agreement with AT&T – in response to the Supreme Court's opinion in *Verizon v. FCC*³⁷⁵ – and thus is seeking to change its contract language regarding UNE combinations.³⁷⁶ Specifically, AT&T takes issue with Pacific Bell's proposed change, arguing that it reflects a narrower interpretation of “new” UNE combinations than the Commission's rules allow.³⁷⁷ Significantly, however, AT&T does not suggest that Pacific Bell currently fails, under its existing agreement, to comply with the Commission's requirements regarding UNE combinations. We note that incumbent LECs bear an obligation to negotiate interconnection arrangements in good faith,” and we would take seriously any allegations brought before us that a party had violated this duty or sought arbitration of issues that it knows the courts or the Commission have resolved. At the same time, we believe it would be inappropriate and premature for us to address this dispute over a proposed change in contract language, which is more appropriately reached by the state commission. Accordingly, we find that AT&T's allegations do not support a finding that Pacific Bell fails to satisfy the requirements of this checklist item.

³⁷¹ Pacific Bell Application App. A, Vol. 5, Affidavit of Colleen L. Shannon (Pacific Bell Shannon Affidavit) at para. 84.

³⁷² Pacific Bell Shannon Affidavit at para. 85.

³⁷³ Pacific Bell Shannon Affidavit at paras. 86-87.

³⁷⁴ AT&T Comments at 30-31. See 47 C.F.R. § 51.315(c).

³⁷⁵ 122 S.Ct. 1646 (2002).

³⁷⁶ AT&T Comments at 31-33, 34-35. *But see* Pacific Bell Shannon Affidavit at para. 85 n.54.

³⁷⁷ AT&T Comments at 31-33, 34-35.

³⁷⁸ *See* 47 U.S.C. § 251(c)(1)

B. Checklist Item 11 – Local Number Portability

104. Section 271(c)(2)(B) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.³⁷⁹ Section 251(b)(2) requires all LECs “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”³⁸⁰ Pacific Bell indicates that it makes local number portability (LNP) available to competitive LECs through interconnection agreements and in conformance with the Commission’s rules.³⁸¹ We note that Pacific Bell has consistently met all performance benchmarks for number portability with few exceptions.³⁸² Based on the evidence in the record, we conclude that Pacific Bell complies with the requirements of checklist item 11.³⁸³

105. We recognize that the California Commission determined that it could not find that Pacific Bell has satisfied the compliance requirements for checklist item 11 until Pacific Bell implemented a new mechanized process, referred to as a “mechanized NPAC check,” designed to ensure that Pacific Bell would not disconnect an end user until the new service provider has completed its installation work.”³⁸⁴ We note, however, that the California Commission did not

³⁷⁹ 47 U.S.C. § 271(c)(2)(B)(xi).

³⁸⁰ 47 U.S.C. § 251(b)(2).

³⁸¹ See Pacific Bell Application, Appendix A. Vol. 5, Tab 21, Affidavit of E.D. Smith (E.D. Smith Aff.) at para 13.

³⁸² In this regard, we look to Pacific Bell’s performance relating to ordering and provisioning work that involves LNP – in particular, performance measurements reflecting the frequency of installation-related troubles. Pacific Bell’s performance data for the months of May through September 2002, demonstrate compliance with checklist item 11. See Pacific Bell Johnson Aff. at paras. 175-180. We note that Pacific Bell’s performance data for the average time to restore provisioning troubles metric indicates a failure to meet the standard for four months. However, given the low order volumes for this metric (approx. 20 per month), we do not find that these disparities warrant a finding of noncompliance. See PM 15a-4691400 (Time to Restore Provisioning Troubles – Port Out OOS), PM 15a-4691500 (Time to Restore Provisioning Troubles – Port Out Service Affecting). Additionally, Pacific Bell has indicated that many of the troubles reflected in this measure are not associated with actual installation work, and thus have nothing to do with the number porting process, but are network troubles that incidentally occur. See Pacific Bell Johnson Aff. at paras. 178-179; Pacific Bell E.D. Smith Aff. at paras. 16-17. See also Pacific Bell Reply Affidavit of Gwen S. Johnson, Tab 10 (Pacific Bell Johnson Reply Aff.) at paras. 37-38; Pacific Bell Reply Affidavit of E.D. Smith, Tab 15 (Pacific Bell E.D. Smith Reply Aff.) at paras. 6-7.

³⁸³ See Pacific Bell Johnson Aff. at paras. 177-180; Pacific Bell E.D. Smith Aff. at paras. 10-20. Pacific Bell also explains that it has worked with the industry to develop functionality to minimize the potential for service disruption to end users resulting from porting of the telephone number, noting that it implemented an unconditional ten-digit trigger feature which eliminates the need to coordinate the disconnect from Pacific Bell’s switch with activation on the Competitive LEC’s switch. See Pacific Bell E.D. Smith Aff. at para. 14.

³⁸⁴ See California Commission Order at 199-200. The California Commission required Pacific Bell to equip its Number Portability Administration Center with a mechanized check function to ensure that a number would not be disconnected by Pacific Bell until the competitive LEC had activated the number. If the activate message is not received by 9:00 p.m. on the due date for porting the number, Pacific Bell automatically delays its disconnect of the (continued....)

identify any particular problems with Pacific Bell's existing systems and processes which, absent the enhancement, warrant a finding of checklist noncompliance. While the California Commission expressed general concern about Pacific Bell's ability to capture service outages for LNP orders cancelled or rescheduled at the last minute in performance measure 15,³⁸⁵ Pacific Bell has explained that it relies on two performance measures to track trouble reports which are designed to capture competitive LEC troubles that are reported both during provisioning (PM 15) or within ten days thereafter (PM 17).³⁸⁶ Accordingly, both measurements are relevant to our analysis and the fact that a particular outage or trouble is reflected in PM 17 rather than PM 15 does not suggest a reporting flaw. We also note, as did the California Commission, that Pacific Bell's performance data reflect a very low level of outages and other troubles associated with the LNP process in the most recent months, prior to implementing the enhancement.³⁸⁷ Indeed, as noted above, Pacific Bell has consistently met all performance benchmarks in this area, with few exceptions.

106. Section 271 requires us to assess whether Pacific Bell is in compliance with the Commission's number portability regulations, and the Department of Justice is correct in pointing out that this Commission has not previously required a mechanized NPAC check to be in place under its regulations or for compliance with checklist item 11.³⁸⁸ Nothing we say here (Continued from previous page)

number for up to six days, giving the competitive LEC time to reschedule the activation of the customer's number. See Pacific Bell E.D. Smith Reply Aff. at paras. 8-9. The California Commission also required Pacific Bell to submit confirmation that the mechanized check was functioning properly, along with 30 days operational data. *Id.* at 200. On Nov. 1, 2002, Pacific Bell provided 31 days of operational data on this enhancement to the California Commission, indicating that the mechanized NPAC check had automatically delayed 273 telephone number disconnections, and had received 14,207 activation verification messages. See Pacific Bell E.D. Smith Reply Aff., at Attach. A.

³⁸⁵ Specifically, the California Commission acknowledged that Pacific Bell's data indicated low error rates for LNP orders and an average trouble report rate (PM 15) that was well within the benchmark for AT&T LNP orders from May through July 2001. The California Commission, however, stated that PM 15 may not capture service outages for those competitive LECs that either reschedule or cancel their LNP orders at the last minute, and noted its concern that such carriers may not "have certain knowledge" of a disconnect. *California Commission Order* at 199-200.

³⁸⁶ See Letter from Colin S. Stretch, Counsel for SBC Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (filed December 12, 2002) (Pacific Bell Dec. 12 *Ex Parte* Lener) at 1-2. Pacific Bell explains that when it ports a number to a competitive LEC, it disconnects the number in its switch after 10pm. Accordingly, where a competitive LEC attempts to reschedule or cancel an LNP order at the last minute that results in a service outage, the resulting trouble is typically opened the following day and captured in PM 17, rather than PM 15. *Id.* at 1 n.2

³⁸⁷ See PM 15 (Provisioning Trouble Report – prior to service order completion); PM 17 (Percentage Trouble in 10 days for Non-Special Orders - Pacific Bell only); See also *California Commission Order* at 198-199 (finding that Pacific Bell's data show very low error rates and an average trouble report rate on AT&T LNP orders "well below the measure's benchmark of 1.00%").

³⁸⁸ See Department of Justice Evaluation at 4 n.13 (noting that the Commission has not previously required a mechanized NPAC check to be in place for compliance with this checklist item) (citing *BellSouth Multistate Order*, 17 FCC Rcd at 17743-44 at para. 263.)

prohibits or preempts the California Commission, or any other state commission, from applying this requirement assuming it is otherwise consistent with the Act: we simply hold here that a mechanized NPAC check is not currently required under the Commission's regulations, and thus not required to show compliance with checklist item 11. Because we find that Pacific Bell's systems and processes in place on the date of filing satisfy this checklist item, we need not consider the impact of Pacific Bell's recently-implemented NPAC check enhancement, or AT&T's corresponding argument that the complete-as-filed rule precludes consideration of this OSS change."

107. We disagree with AT&T that Pacific Bell's provision of number portability is discriminatory. According to AT&T, Pacific Bell's LNP procedures have resulted in a loss of dial tone for an unacceptably high number of AT&T's customers for its Digital Link and Broadband services." AT&T explains that Pacific Bell does not process last-minute customer cancellations or reschedulings quickly and efficiently, with the result that the customer's number may be disconnected before porting, with a loss of service to the customer." However, Pacific Bell indicates that from July through September, 99 percent of the requests submitted by AT&T to cancel or reschedule conversions were processed by Pacific Bell without complaint by AT&T.³⁹² Furthermore, as noted above, Pacific Bell's performance data reflect that competing LECs' customers experience troubles during the number porting process only rarely. We recognize that last-minute cancellations by end users can complicate the provisioning process and require special coordination and adjustments by the provisioning carriers. While the record reveals that this coordination was not without flaws, it also indicates that Pacific Bell was able to **make** the necessary adjustments for the vast majority of these cases.

108. In addition, AT&T raises doubt regarding the reliability of Pacific Bell's performance measures 15 and 17 and whether these measures appropriately capture LNP-related service outages.³⁹³ However, as discussed above, Pacific Bell has explained that both performance measures track trouble reports and are designed to capture competitive LEC

³⁸⁹ See AT&T November 27 Young *Ex Parte* Lener, Supplemental Declaration of Walter Willard at 30.

³⁹⁰ AT&T Comments at 51. Specifically, AT&T states that, in some months, three to five percent of its new Digital Link and Broadband customers have suffered dial tone losses during the number porting process; however, AT&T does not specify the relevant time period. See AT&T Comments at 53.

³⁹¹ AT&T Comments at 52-53.

³⁹² Pacific Bell E.D. Smith Reply *Aff.* at para. 7 (*citing confidential information*). Pacific Bell submits that, *although* it assists AT&T and other competitive LECs in canceling and rescheduling "last minute" conversions, it is ultimately the responsibility of the competitive LEC to ensure that conversions are cancelled or rescheduled in a timely manner. *Id.* at para. 6.

³⁹³ See Lener from Richard E. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed December 9, 2002) (AT&T Dec. 9 *Ex Parte* Letter) at 2-5.

troubles that are reponed during provisioning (PM 15) or within ten days thereafter (PM 17).³⁹⁴ In addition, AT&T claims that Pacific Bell's reported data for October is inconsistent with AT&T's own data, because Pacific Bell's October data show 16 outages while AT&T's data show 26 outages.³⁹⁵ Pacific Bell responds that AT&T's claims could not be verified or investigated without further documentation from AT&T, and notes that AT&T did not request data reconciliation for performance measures 15 or 17 for the time period relevant to this application.³⁹⁶ We note that Pacific Bell reports PM 15 and PM 17 in accordance with the California Commission approved performance measure process. Additionally, no party challenged the accuracy of these measurements for the relevant months for this application (May to September 2002). Moreover, because the outage rate claimed by AT&T for October is small, 2.3 percent, and, given that Pacific Bell has taken steps to contact AT&T to solicit more information to conduct data reconciliation, we do not find that these allegations warrant a finding of noncompliance.

109. Finally, we reject XO's claim that Pacific Bell takes approximately two to three weeks to disconnect DSL customers switching to XO voice service.³⁹⁷ Pacific Bell replies that it has procedures in place to process an order to disconnect DSL service within one business day, and effectuate the "LNP within loop" conversion request within five business days.³⁹⁸ Pacific Bell asserts that any time beyond this six-day total processing time is attributable to the amount of time for the data LEC to send the DSL disconnect order to Pacific.³⁹⁹ In the absence of further evidence suggesting a different reason for disconnect processing delays, we do not find that XO's claim warrants a finding of noncompliance with this checklist item. Pursuant to section

³⁹⁴ See Pacific Bell Dec. 12 *Ex Parte* Letter at 1-2. Pacific Bell notes that although the California Commission stated that "PM 15 does not capture service outages for LNP orders either rescheduled or canceled at the last minute," as noted above, last minute rescheduled orders that do result in a service outage are typically reported by the Competitive LEC in the following day's trouble reports and thus are captured in PM 17. If however, the competitive LEC does report the trouble on the originally scheduled date, the trouble is captured in PM 15. See Pacific Bell Dec. 12 *Ex Parte* at 1 n.2.

³⁹⁵ See AT&T Dec. 9 *Ex Parte* Letter at 2-3 and Attach. 1. Specifically, AT&T claims that Pacific Bell's reported October data show 16 outages while AT&T's data show 26 outages out of 1,133 LNP orders, changing the outage rate from 1.4% to 2.3%. *Id.* at 2 & n.4.

³⁹⁶ See Pacific Bell Dec. 12 *Ex Parte* at 2; See also AT&T Dec. 9 *Ex Parte* Letter at 2 & n.4 and Anach. 1 (attaching Pacific Bell reported data); Letter from Richard E. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed December 13, 2002) (AT&T Dec. 13 *Ex Parte* Letter) at 1-2 and Anach (providing the relevant purchase order numbers, disconnect order numbers, telephone numbers and other identifying information on which it bases its claims).

³⁹⁷ See XO Comments at 23-24. XO asserts that Pacific Bell "refused to port numbers in a timely and efficient manner where migrating customers purchase both voice and DSL services from ... Pacific." XO Comments at 22

³⁹⁸ See Pacific Bell Application, Appendix A, Vol. 1, Tab 3, Affidavit of Carol Chapman (Pacific Bell Chapman Aff.) at para. 90; Pacific Bell Reply Affidavit of Carol Chapman, Tab 3 (Pacific Bell Chapman Reply Aff.) at paras. 9-12.

³⁹⁹ See Pacific Bell Chapman Aff. at para. 90. See also Pacific Bell Reply at 65-66.

271(d)(6), we will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order. XO and others should bring to the attention of the Commission's Enforcement Bureau any areas of deteriorating performance.

C. Checklist Item 14 – Resale

110. Section 271(c)(2)(B)(xiv) of the Act requires that a BOC make “telecommunications services... available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3).”⁴⁰⁰ Based on the record in this proceeding, we find that Pacific Bell satisfies the requirements of this checklist item in California.⁴⁰¹ Pacific Bell has demonstrated that it has satisfied its legal obligation to make retail telecommunications services available for resale to competitive LECs at wholesale rates.⁴⁰² Neither the California Commission nor the other commenting parties question Pacific Bell's showing of compliance with the requirements of this checklist item except in the area of resale of advanced services, which we discuss below.

111. The California Commission concluded that Pacific Bell has erected “unreasonable barriers to entry” in California's DSL market in two regards. First, the California Commission found that Pacific Bell does not comply with its resale obligations, based on a finding Pacific Bell does, in fact, offer a retail DSL telecommunications service that is subject to resale under 251(c)(4)(A).⁴⁰³ Second, the California Commission found that certain “restrictive conditions” present in Pacific Bell's interconnection agreements with competitive LECs violate the resale obligations under section 251(c)(4)(B).⁴⁰⁴ We address these issues in turn.

112. First, we find that Pacific Bell satisfies its resale obligations under section 251(c)(4)(A) with respect to advanced services. According to Pacific Bell, it provides three categories of DSL-related service: (1) “[w]holesale DSL [t]ransport to ISPs, including its ISP affiliate”; (2) “a DSL Internet service at retail to the ISPs' subscribers”; and (3) “retail

⁴⁰⁰ 47 U.S.C. § 271(c)(2)(B)(xiv).

⁴⁰¹ Pacific Bell has generally met the applicable resale performance measures for most months from May through September. See PM 5-521900-522000 (Percentage of Orders Jeopardized, Resale); PM 6-640000-640100, **PM 6-644300-644400**, PM 6-648500-648600 (Average Jeopardy Notice Interval, Resale); PM 7 (Average Completed Interval, Resale); PM 16 (Percent Troubles in 30 Days, Resale); PM 19-1991600-1992400 (Customer Trouble Report Rate, Resale); PM 20-2093100-2094800 (Percentage of Customer Trouble Not Resolved Within Estimated Time, Resale); PM 21-219200-2194800 (Average Time to Restore, Resale); PM 23-2391600-2392400 (Frequency of Repeat Troubles in 30 Day Period, Resale).

⁴⁰² See Pacific Bell Application App. A, Vol. 1, Tab, 8, Affidavit of John S. Habeeb (Pacific Bell Habeeb Aff.).

⁴⁰³ See *California Commission Order* at 219-20 (noting that “it is the affiliation between . . . [Pacific, its advanced service affiliate and its Internet affiliate] that effectively creates Pacific's provision of DSL Transport services at retail”

⁴⁰⁴ See *California Commission Order* at 220

telecommunications services ... available for resale at a wholesale discount.”⁴⁰⁵ With respect to the last category, Pacific Bell indicates that these services *are* available for resale at wholesale discount of 17 percent in California.”⁴⁰⁶ With regard to the first two categories, Pacific Bell argues that it is not providing DSL telecommunications service at retail and, thus, has no obligation to make these services available for resale pursuant to the section 251(c)(4) discount.⁴⁰⁷

113. Pacific Bell’s position is the same in all material respects as that taken by SBC on this issue in the Arkansas/Missouri section 271 proceeding, and that taken by BellSouth in the Georgia/Louisiana section 271 proceeding.⁴⁰⁸ In both proceedings, the Commission found that the Bell company applicant “d[id] not have a present obligation to offer DSL transport service for resale” under section 251(c)(4), and noted that the Bell company’s Internet service is **an** information service, not a telecommunications service.⁴⁰⁹ We thus do not agree with the California Commission’s conclusion that the relationship between the three Pacific Bell entities “effectively creates Pacific’s provision of DSL Transport Services at retail.”⁴¹⁰ Moreover, as we stated in previous orders, we expect that how we decide questions about the regulatory treatment of the underlying transmission facilities provided by incumbent LECs with their own Internet access services could have far-reaching implications for a wide range of issues that would be more appropriately handled separately.⁴¹¹ Indeed, many of these issues are being addressed in a pending proceeding before the Commission.⁴¹² We thus could not endorse the California Commission’s conclusion without conflicting with our own precedent in this area and prejudging the outcome of this pending proceeding.

⁴⁰⁵ Pacific Bell Habeeb Aff. at paras. 16-29

⁴⁰⁶ These advanced telecommunications services include “Frame Relay” and “**ATM** Cell Relay” services to **business** customers, as well as intrastate and interstate DSL transport to business with a Remote Local Area Network (R-LAN). See Pacific Bell Application at 81-82.

⁴⁰⁷ See Pacific Bell Application at 81

⁴⁰⁸ See Pacific Bell Application at 81; Pacific Bell Reply at 68.

⁴⁰⁹ **SWBT Arkansas/Missouri Order**, 14 FCC Rcd at 20761, para. 84; **see also BellSouth Georgia/Louisiana Order**, 17 FCC Rcd at 9175, para. 275.

⁴¹⁰ California Commission Order at 220.

⁴¹¹ See **SWBT Arkansas/Missouri Order**, 14 FCC Rcd at 20759, para. 82; **BellSouth Georgia/Louisiana Order**, 17 FCC Rcd at 9175, para. 277.

⁴¹² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001) (*Triennial Review NPRM*); **see also Appropriate Framework for Broadband Access to Internet over Wireline Facilities**, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*).

114. We also disagree with the California Commission's interpretation of the D.C. Circuit's opinion in *ASCENT v. FCC*,⁴¹³ and its conclusion that *ASCENT* requires a different result. In that opinion, the D.C. Circuit specifies that an incumbent LEC cannot "avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services."⁴¹⁴ Pacific Bell does not suggest that any of its services are exempt from 251(c)(4) simply because they are provided by an affiliate. As explained above, Pacific Bell contends that neither the DSL transport, nor the DSL Internet service provided by its affiliates are telecommunications services sold at retail. Thus, as we have found twice before, because Commission precedent does not address the specific facts or legal issues raised here, we decline to reach a conclusion in the context of this section 271 proceeding.⁴¹⁵ Therefore, **we** find that this issue does not warrant a finding of checklist noncompliance.

115. Finally, we disagree with the California Commission's finding that there exist "restrictive conditions" in Pacific Bell's interconnection agreements that warrant a finding of checklist noncompliance.⁴¹⁶ "We note that the California Commission does not provide details or explain exactly how these "restrictive conditions" violate section 251(c)(4)(B).⁴¹⁷ Nor, for that matter, do any of the other commenters identify any particular "restrictive conditions" or explain why they violate the Act." Accordingly, in the absence of factual support in our record, we do not agree with the California Commission's conclusion on this issue, and do not find that it warrants a finding of noncompliance with checklist item 14. Pursuant to section 271(d)(6), we will monitor Pacific Bell's compliance with the conditions of approval in this order with respect to this issue.

⁴¹³ *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (*ASCENT*).

⁴¹⁴ *ASCENT* 235 F.3d at 668.

⁴¹⁵ *SWBT Arkansas/Missouri* Order, 14 FCC Rcd at 20759-60, para. 82; see also *BellSouth Georgia/Louisiana* Order, 17 FCC Rcd. at 9176, para. 277.

⁴¹⁶ See California Commission Order at 220.

⁴¹⁷ See California Commission Order at 220.

⁴¹⁸ On December 17, 2002, AT&T submitted three pages of a brief filed before the California Commission in August, 2001 which, it explained, had been erroneously omitted from an earlier filing in this proceeding. See Letter from Peter M. Andros, Legal Assistant for Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed December 17, 2002). In these pages, AT&T argued that several provisions in an interconnection agreement between ASI and DSL.net were "discriminatory and unreasonable." *Id.*, at Attach., pages 2-4. We note that these provisions had not been identified by AT&T or any other party earlier in this proceeding. In any case, we need not address the substantive arguments raised in this late filing because Pacific Bell does not rely on the interconnection agreement between ASI and DSL.net to demonstrate compliance with checklist item 14, but relies instead on the interconnection agreement between ASI and Navigator Telecommunications, LLC. See Pacific Bell Brief at 82, and App. B, Tab II; see also *SBC Texas 271* Order at para. 78 (basing a finding of checklist compliance on language in one interconnection agreement, the terms and conditions of which were available to any requesting carrier pursuant to section 252(i)).

V. OTHER CHECKLIST ITEMS

A. Checklist Item I – Interconnection

116. Section 271(c)(2)(B)(i) requires the BOC to provide equal-in-quality interconnection on terms and conditions that are just, reasonable and nondiscriminatory in accordance with the requirements of sections 251 and 252.⁴¹⁹ Based on our review of the record, we conclude, as did the California Commission, that Pacific Bell is in compliance with the requirements of this checklist item.” In reaching this conclusion, we examine, as in prior section 271 orders, Pacific Bell’s performance with respect to interconnection trunks and collocation.⁴²¹ We find that Pacific Bell has satisfied the vast majority of its performance benchmarks or retail comparison standards for this checklist item.” In addition, we find that Pacific Bell satisfies its statutory requirements for the provisioning of collocation and offers interconnection at all technically feasible points in California.

117. *Interconnection Pricing.* Checklist item I requires a BOC to provide “interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).”⁴²³ Section 251(c)(2) requires incumbent LECs to provide interconnection “at any technically feasible point within the carrier’s network . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”⁴²⁴ Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.⁴²⁵ The Commission’s

⁴¹⁹ 47 U.S.C. § 271(c)(2)(B)(i)

⁴²⁰ See *California Commission Order* at 29

⁴²¹ See, e.g., *BellSouth Multistate Order*, 17 FCC Rcd at 17715, para. 213

⁴²² See PM 8-03600, PM 8-07200, PM 8-10800, PM 8-14400 (Percent Completed Within Standard Interval – Interconnection Trunks); PM 11-05900, PM 11-11800, PM 11-17700, PM 11-23600 (Percent of Due Dates Missed – Interconnection Trunks); PM 7-05900, PM 7-11800, PM 7-17700, PM 7-23600 (Average Completed Interval – Interconnection Trunks); PM 19-93700 (Customer Trouble Repon Rate – Interconnection Trunks); PM 21-97500 (Average Time to Restore – Interconnection Trunks), PM 23-93700 (Frequency of Repeat Troubles in 30 Day Period – Interconnection Trunks); PM 24-00100 (Percent Blocking on Common Trunks); PM 25-00700 (Percent Blocking on Interconnection Trunks (Total Trunk Groups)). PM 25-00700 (Percent Blocking on Interconnection Trunks (ILEC Tandem Office to CLEC End Office)); PM 40-00100 (Time to Respond to a Collocation Request – Space Availability), PM 40-00200 (Time to Respond to a Collocation Request – Price & Schedule Quote); PM 41-00100 (Time to Provide a Collocation Arrangement – New), PM 41-00200 (Time to Provide a Collocation Arrangement – Augmentation). See also Pacific Bell *Johnson Aff.* at paras. 48-57.

⁴²³ 47 U.S.C. § 271(c)(2)(B)(i).

⁴²⁴ *Id.* § 251(c)(2).

⁴²⁵ *Id.* § 252(d)(1).

pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation at rates that are based on TELRIC.⁴²⁶

118. Based on the evidence in the record, we find that Pacific Bell offers interconnection in California to other telecommunications carriers at just, reasonable, and nondiscriminatory rates in compliance with checklist item 1. The California Commission concludes that Pacific Bell's interim interconnection prices are "in compliance with the law, subject to . . . [the commission's] imminent determination of permanent rates, terms and conditions"" and that Pacific Bell makes trunking available pursuant to . . . [California Commission]-approved interconnection agreements and FCC rules[.]""⁴²⁸ The California Commission also concludes that Pacific Bell has satisfied the requirements of checklist item 1.⁴²⁹

119. We reject Vycera's argument that Pacific Bell fails to provide interconnection on rates and terms that are just, reasonable, and nondiscriminatory. Vycera alleges that Pacific Bell refuses to permit Vycera to opt into an August 14, 2001 interconnection agreement arbitrated between AT&T and Pacific Bell unless Vycera agrees to a lengthy amendment that, according to Pacific Bell, addresses issues related to compensation for JSP-bound traffic." Vycera states that Pacific Bell filed an application for arbitration on September 18, 2002 to prevent Vycera's adoption of the interconnection agreement." Pacific Bell responds that the commission "need not and should not" address this interconnection dispute because the California Commission placed the arbitration proceeding on an expedited schedule and that the commission expects to reach a decision by January 9, 2003.⁴³²

⁴²⁶ See 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

⁴²⁷ *California Commission Order* at Conclusion of Law No. 6

⁴²⁸ *Id.* at Conclusion of Law No. 7

⁴²⁹ *Id.* at Conclusion of Law No. 9

⁴³⁰ Vycera Comments at 2-3 (citing August 4, 2000 Interconnection Agreement between SBC Pacific Bell and AT&T Communications of California, Inc.); *see also id.* at 6, n.16 (citing Pacific Bell Telephone Company's Application for Arbitration of Advice Letter No. 57 Filed by Vycera Communications, Inc. f/k/a Genesis Communications International, Inc., U-5477-C, **Ex. 2** at 6 (Pacific Bell Application for Arbitration)); *see also* Letter from Patrick J. Donovan, Esq., Rogena C. Harris, **Esq.**, Katherine A. Rolph, Esq., Counsel for Vycera, to David P. Discher, Pacific Bell Telephone Company (filed Nov. 8, 2002) (Vycera Nov. 8 **Ex Parte** Letter) (requesting that Pacific Bell immediately allow Vycera to adopt all provisions of the Pacific Bell-AT&T interconnection agreement, effective September 18, 2002, with the exception of the reciprocal compensation provisions pending before the California Commission).

⁴³¹ Vycera Comments at 4 (citing Pacific Bell Application for Arbitration).

⁴³² Pacific Bell Shannon **Reply** Aff. at para. 5

120. We have previously stated that we are reluctant to deny a section 271 application because a BOC is engaged in an unresolved rate dispute with its competitors before the state commission, which has primary jurisdiction over the matter.'" As we have also stated in prior section 271 orders, although we have an independent obligation to ensure compliance with the checklist, "section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions."⁴³⁴ Here, we believe this dispute is a local arbitration decision for the California Commission in the first instance. The record indicates that Pacific Bell's application for arbitration regarding Vycera's adoption of the interconnection agreement is pending before the California Commission.'" We have confidence that the California Commission will resolve this interconnection dispute between Pacific Bell and Vycera consistent with our rules.

121. We also reject the allegation of PSI and Touch Tel that Pacific Bell should fail this checklist item because it has inappropriately charged these paging companies for the delivery of interconnection services.'" PSI and Touch Tel claim that Pacific Bell never should have imposed interconnection charges, because the Commission prohibits LECs from charging paging companies for the delivery of LEC-originated traffic and for the associated facilities.⁴³⁷ Pacific Bell responds that this fact-intensive issue was not raised in the California 271 proceeding and therefore should not be addressed here.⁴³⁸ Pacific Bell states that it is currently involved in negotiations with PSI and Touch Tel to resolve the amount of any refund which may be due them for past bills relating to the disputed charges, and to address Pacific Bell's charges on a going-forward basis.⁴³⁹ Pacific Bell states that although it has billed PSI and Touch Tel for the interconnection charges, it has not taken adverse action against them for failure to pay the disputed charges.'"

122. As we have stated previously, when a party raises a challenge related to a pricing issue for the first time in the Commission's section 271 proceedings without showing why it was not possible to raise it before the state commission, we may exercise our discretion to give this

⁴³³ *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20754, para. 73

⁴³⁴ *Verizon New Jersey Order*, 17 FCC Rcd at 12354, para. 159 (quoting *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 118); *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20776, para. 115.

⁴³⁵ Pacific Bell Shannon Reply Aff. at paras. 2, 5, and 6.

⁴³⁶ PSI and Touch Tel Comments at 3-4

⁴³⁷ *Id.* at 2-6 (citing *TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, (2000). *aff'd*, *Qwest Corp. v. FCC*, 252 F.3rd 462 (D.C. Cir. 2001)).

⁴³⁸ Pacific Bell Shannon Reply Aff. at paras. 27 and 32

⁴³⁹ *Id.* at para. 30.

⁴⁴⁰ *Id.* at para. 31

challenge little weight.''' Although we do not require parties to raise all pricing issues at the state level before raising them in a section 271 proceeding, it is generally impractical for us to make the fact-specific findings that objecting parties require us *to* make regarding factual disputes.''' We have held in such instances that if a BOC applicant provides a reasonable explanation concerning the issue raised by the objecting party, we will not find that the objecting party persuasively rebuts the *prima facie* showing of 271 compliance.⁴⁴³ Here, we find that the objecting parties did not raise this issue before the state commission. We also find that Pacific Bell's explanation, that the interconnection charge dispute is the subject of an ongoing negotiation, reasonable under the circumstances. PSI and Touch Tel have failed adequately to demonstrate a checklist violation. For these reasons, we conclude that Pacific Bell has complied with the pricing requirements under this checklist item.

B. Checklist Item 4 – Unbundled Local Loops

123. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide “[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services.”⁴⁴⁴ Based on the evidence in the record, we conclude, as did the California Commission, that Pacific Bell provides unbundled local loops in accordance with the requirements of section 271 and our rules.⁴⁴⁵ Our conclusion is based **on** our review of Pacific Bell's performance for all loop types, which include voice-grade loops, xDSL-capable loops, digital loops, high-capacity loops, as well as our review of Pacific Bell's processes for hot cut provisioning, and line sharing and line splitting. **As** of the end of September 2002, competitors in California have acquired from Pacific Bell and placed into use approximately 494,000 stand-alone loops (including DSL loops) and about 222,000 UNE-P loop and switch port combinations.⁴⁴⁶

124. Consistent with prior section 271 orders, we do not address every aspect of Pacific Bell's loop performance where our review of the record satisfies us that Pacific Bell's performance is in compliance with the relevant parity and benchmark performance standards established in California.⁴⁴⁷ Instead, we focus our discussion on those areas where the record

⁴⁴¹ *New Hampshire/Delaware Order* at para. 88 (quoting *BellSouth Multistate Order* at para. 32); *see also BellSouth Multistate Order* at paras. 97 and 112.

⁴⁴² *See Georgia/Louisiana Order*, 17 FCC Rcd at 9045, para. 49.

⁴⁴³ *BellSouth Multistate Order* at para. 32.

⁴⁴⁴ 47 U.S.C. § 271(c)(2)(B)(iv); *see also* Appendix C (setting further the requirements under checklist item 4).

⁴⁴⁵ *California Commission Order* at 153.

⁴⁴⁶ Pacific Bell *J.G. Smith Aff.* at Attach. A

⁴⁴⁷ *See, e.g., Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219.

indicates discrepancies in performance between Pacific Bell and its competitors in California. In making our assessment, we **look** for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to **compete**.⁴⁴⁸ Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist **noncompliance**.⁴⁴⁹ Nevertheless, under certain circumstances, disparity with respect to one performance measurement may support a finding of noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to **compete**.⁴⁵⁰

125. Based on the evidence in the record, we find that Pacific Bell demonstrates that it provides hot cuts, high-capacity loops, voice-grade loops, digital loops, xDSL-capable loops, as well as line sharing and line splitting in California in accordance with the statutory requirements pertaining to checklist item **4**. Only one party, XO, raised concerns regarding Pacific Bell's loop performance.⁴⁵¹ We address isolated performance disparities associated with these loop types below, as well as XO's allegations with regard to voice-grade loops and high-capacity loops. We find that these issues do not demonstrate discriminatory performance, but we will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order.

126. *Voice-Grade Loops*. We conclude, as did the California Commission, that Pacific Bell demonstrates it provides voice-grade loops in a nondiscriminatory manner.'" Pacific Bell has consistently met the benchmark and parity standards for installation timeliness, installation quality, and the quality of the maintenance and repair functions with few exceptions.⁴⁵³

⁴⁴⁸ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

⁴⁴⁹ See *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

⁴⁵⁰ *Application of Verizon Virginia, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Virginia*, WC Docket No. 02-214, FCC 02-297, Memorandum Opinion and Order (rel. October 30, 2002), at C-6, para. 9.

⁴⁵¹ XO comments at 16-21

⁴⁵² *California Commission Order* at 143, 153

⁴⁵³ See PM 17-1791100 (%Troubles in 10 days for Non-Special Orders); PM 11-Statewide (% of Due Dates Missed – for UNE loop 2 wire analog 8db and 5.5db loop); PM 12-Statewide (% of Due Dates Missed Due to Lack of Facilities – for UNE Loop 2 wire analog 8db and 5.5db loop); PM 19-1992603 (Customer Trouble Report Rate – for UNE loop 2 wire analog 8db and 5.5db loop); PM 21-2195401 (Average Time to Restore – for UNE loop 2 wire analog 8db and 5.5db loop). We note that Pacific Bell's performance with respect to the frequency of the repeat troubles within 30 days metric fails to meet parity for three out of the relevant five month period, which we discuss below.

127. Pacific Bell acknowledges that it has encountered difficulties, in some instances, in achieving the parity standard for repeat troubles on voice-grade loops.⁴⁵⁴ As a consequence, Pacific Bell has developed and implemented a number of operational changes with respect to maintenance of voice-grade loops. First, Pacific Bell states that its **new** Fault Isolation Test (FIT) process provides for the complete description of troubles reported, and better defines whether troubles are inside Pacific Bell's central office, outside plant facilities, or in the competitive LECs' network.⁴⁵⁵ Pacific Bell provides that this testing process is completed as quickly as possible and in many cases is concluded with results reported to the competitive LEC before the trouble reporting call has ended.⁴⁵⁶ Along with the FIT process, Pacific Bell states that it has implemented a number of other operational changes that have resulted in a more timely resolution of troubles on voice-grade loops, and a reduction in the number of repeat troubles.⁴⁵⁷ We note that Pacific Bell achieved parity in July 2002, after a three-month improvement trend.⁴⁵⁸ Furthermore, the performance data indicates only minor discrepancies in August performance, while Pacific Bell achieved parity again in September.⁴⁵⁹ Moreover, Pacific Bell's performance reflected by another maintenance and repair metric – average time to restore interval – has

⁴⁵⁴ See PM 23-2392601 (Frequency of Repeat Troubles within 30 days). Pacific Bell missed parity in May, June, and August by 2.22%, 1.68%, and 1.95%, respectively. Given the slight disparities in performance (with competing LECs experiencing between 0.94 and 2.22 % more repeat troubles than Pacific Bell retail in May through September) these misses do not appear to indicate a competitively significant or systemic problem. The comparable numbers were 10.09%, 9.71%, 9.43%, 9.96% and 8.39% for competitive LECs and 7.87%, 8.03%, 8.49%, 8.01% and 7.15% for Pacific Bell retail in May, June, July, August and September, respectively. Pacific Bell Application App. A, Vol. 4b, Tab 15, Affidavit of Richard J. Mona (Pacific Bell Mona Aff.) at paras. 26-22.

⁴⁵⁵ Pacific Bell Mona Aff. at paras. 26-32. Pacific Bell states that it established the Fault Isolation Test (FIT) in order to help reduce the number of trouble reports received on a line (i.e., repeat reports) and length of time required to resolve troubles. Pacific Bell also states that the FIT process allows Pacific Bell technicians to interact directly with the competitive LECs when the competitive LEC reports a trouble condition.

⁴⁵⁶ Pacific Bell Mona Aff. at para. 28

⁴⁵⁷ Pacific Bell Mona Aff. at para 28. Along with the FIT process, Pacific has instituted a number of other operational changes with respect to maintenance of basic loops. New job aids were distributed in April 2002 to Pacific Bell's Work Coordination Center personnel who manage the tracking and dispatch of maintenance troubles reported by competitive LECs and to the field technicians who repair these troubles. Pacific Bell states that training on these job aids was ongoing throughout May to September 2002. Also Pacific Bell states that in May and June, programming of maintenance trouble dispatch systems was upgraded so that competitive LEC trouble tickets receive priority dispatch to field technicians for resolution. Additionally, field technician qualification lists were reviewed and updated to ensure that competitive LEC troubles were always dispatched to a technician with sufficient technical expertise to efficiently resolve the service problem. Finally, Pacific Bell points out that the WCC reinforced its process with its technicians whereby all competitive LEC trouble tickets are reviewed daily to ensure no trouble tickets are held due to administrative error. *Id.* at para. 29.

⁴⁵⁸ Pacific Bell indicates that the average repeat trouble report rate for competitive LECs from May through July was 9.74%. In the nine months prior to April 2002, before the improvement processes were implemented, the repeat report rate averaged 12.80%. Pacific Bell states that this comparative performance reflects a reduction in competitive LECs' repeat reports of about 25%. Pacific Bell Mona Aff. at para 32.

⁴⁵⁹ Pacific Bell's performance disparity for August was 1.95%

achieved parity for all five of the relevant months.⁴⁶⁰ Accordingly, since Pacific Bell has demonstrated efforts to improve its performance and because performance disparities are small, we find that these misses do not warrant a finding of noncompliance.

128. We thus reject XO's contention that Pacific Bell's performance for repeat troubles for voice-grade loops illustrates discriminatory performance for competitive LECs.⁴⁶¹ XO notes that, even with efforts in place that are specifically designed to improve performance, Pacific Bell nevertheless missed the standard for this metric.⁴⁶² As stated above, however, the record reflects improved performance, and parity in two of the last three months. Given this evidence, and recognizing that Pacific Bell is providing voice-grade loops of a quality sufficient to afford competitors a meaningful opportunity to compete, we do not find that XO's claims warrant a finding of checklist noncompliance.

129. *High-Capacity Loops.* Based on the evidence in the record, we find, as did the California Commission, that Pacific Bell provides high-capacity loops to competing carriers in a nondiscriminatory manner.⁴⁶³ Pacific Bell's performance on the relevant measurements, satisfy the parity or benchmark standards, with few exceptions.⁴⁶⁴ While Pacific Bell fails to satisfy the relevant benchmark and parity standard for several metrics, we find that these misses generally are isolated and slight, and thus do not warrant a finding of checklist noncompliance. Two metrics relating to Pacific Bell's maintenance and repair functions, however, warrant further discussion, which we provide below.⁴⁶⁵

130. We note that Pacific Bell failed to reach and maintain parity with respect to two maintenance and repair measures – the Percentage of Customer Troubles not Resolved Within the Estimated Time and the Average Time to Restore – for several of the most recent months.⁴⁶⁶ These measures address the speed with which Pacific Bell repairs troubles on high-capacity

⁴⁶⁰ See PM 21-2 195401 (Average Time to Restore).

⁴⁶¹ XO comments at 19

⁴⁶² XO comments at 19; See PM 23-2392601 (Frequency of Repeat Troubles within 30 days).

⁴⁶³ *California Commission Order* at 153

⁴⁶⁴ See Appendix B.

⁴⁶⁵ See PM 20-2095801 (% of Customer Troubles Not Resolved Within Estimated Time); and PM 21-2196001 (Average Time to Restore).

⁴⁶⁶ See PM 20-2095801 (% of Customer Trouble Not Resolved Within Estimated Time). Pacific Bell missed parity in May, June, August and September by 4.56% to 11.95%. The comparable numbers were 39.16%, 34.55%, 34.84%, 35.96%, and 38.8% for competitive LECs and 32.4%, 29.99%, 30.86%, 30.18% and **26.85%** for Pacific Bell retail in May, June, July, August and September, respectively. We note that Pacific Bell did achieve parity for the month of July. See Also PM 21-2196001 (Average Time to Restore). Pacific Bell missed parity in May, June, July, August and September. The comparable numbers were 4.29, 4.13, 3.72, 3.96 and 4.28 for competitive LECs and 3.77, 3.44, 3.58, 3.49 and 3.14 for Pacific Bell retail in May, June, July, August and September, respectively.

loops. These results suggest that Pacific Bell is not repairing troubles for competitive LECs as quickly as it is for Pacific Bell's own retail operation. As an initial matter, we note that the disparity in the average time to restore measurement, reflects a minimal percentage difference between competitive LECs and Pacific Bell's retail customers.⁴⁶⁷ We also recognize that Pacific Bell's performance on other maintenance and repair measurements relating to high-capacity loops, and Pacific Bell's repair timeliness with respect to loops in general, indicates nondiscriminatory performance. Specifically, we note that competitive LECs routinely encounter a low rate of high-capacity loop troubles (under 3 percent) that is consistently lower than those encountered by Pacific Bell's retail operation.⁴⁶⁸ Furthermore, we note that Pacific Bell's repair timeliness has achieved parity for all other loop types, and that the number of DSI loops in service for competitive LECs is only approximately 2 percent of all competitive LECs' loops placed in service by Pacific Bell.⁴⁶⁹ Finally, Pacific Bell acknowledges that it has had problems with regard to these maintenance timeliness metrics, and indicates that it has implemented operational improvements in the prioritization of competitive LEC maintenance tickets for special services, including DSI loops.⁴⁷⁰

131. We thus reject XO's claims that Pacific Bell's performance relating to high-capacity loops demonstrates noncompliance with checklist item 4. Specifically, XO calls attention to each incident of non-parity performance in the last five months on the metrics related to high-capacity loops.'" As noted above, however, most of these performance disparities were

⁴⁶⁷ Pacific Bell points out that the disparity in average time to restore between Pacific Bell's performance for its retail operation and for competitive LECs is less than 2 hours for any of the relevant months. Moreover, Pacific Bell argues that in the months of July, August and September 2002, the difference in the restoral intervals for competitive LEC DSI loops was no more than 75 minutes in any one month, and for the average three-month period of July through September, the difference was only slightly more than 30 minutes. See Pacific Bell Johnson Reply Aff. at 47.

⁴⁶⁸ See PM 19-1992910 (Customer Trouble Report Rate). Pacific Bell points out that competitive LEC high-capacity loop trouble report rates are routinely under 3%. The comparable numbers for PM 19-1992910 were 2.8%, 2.8%, 2.49%, 2.84% and 2.57% for competitive LECs and 3.35%, 2.84%, 2.90%, 3.25% and 3.17% for Pacific Bell retail in May, June, July, August and September, respectively.

⁴⁶⁹ Pacific Bell Johnson Reply Aff. at paras. 44-45. We note that in prior section 271 orders the Commission has supported a finding of checklist compliance given the relatively low volume of high-capacity loops compared to all loop types. See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9151-52, para. 232.

⁴⁷⁰ Pacific Bell Johnson Aff. at para. 138. See also Pacific Bell Application Reply App., Tab 10, Affidavit of Gwen S. Johnson (Pacific Bell Johnson Aff.) at para. 46-47. Pacific Bell further argues that operational variances contribute to the minor differences in performance for competitive LECs. Specifically, Pacific Bell refers to the fact that more than 50% of troubles reported by retail customers are closed to "test okay" (TOK) or "no trouble found" (NTF), as compared to 25%-30% for competitive LECs. Pacific Bell argues that the higher percentage of these tickets in the retail data cause the appearance of superior retail performance, and that the removal would bring Pacific Bell into parity. As a result Pacific Bell concludes, that while competitive LECs focus solely on the statistical difference in performance, they demonstrate no practical harm.

⁴⁷¹ With the exception of PM 11(Statewide) % of Due Dates Missed, the various performance measures raised by XO are addressed below. We note that XO raises Pacific Bell's failure to achieve parity with respect to the % of (continued....)

intermittent and slight.⁴⁷² As such, we do not find that lack of parity on these performance measurements warrant a finding that Pacific Bell fails to meet checklist item 4.

132. *Line Sharing and Line Splitting.* Based on the evidence in the record, we find, as did the California Commission, that Pacific Bell provides nondiscriminatory access to the high frequency portion of the loop.⁴⁷³ For the relevant five-month period, Pacific Bell provisioned over 16,000 line sharing orders in California for unaffiliated competitive LECs.⁴⁷⁴ Pacific Bell's performance data for line-shared loops demonstrates that it is generally in compliance with the parity and benchmark measures established in California.⁴⁷⁵ Pacific Bell also complies with its

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Due Dates Missed for California's Northern Region in two of the five relevant months. See PM 11-1110901 (% of Due Dates Missed). However, as noted in prior section 271 applications, we limit our review to statewide performance data. Our review of Pacific Bell's statewide performance for this metric demonstrates that Pacific Bell met the parity standard for all five of the relevant months. The comparable numbers were 1.98%, 1.56%, 1.34%, 1.98% and 1.96% for competitive LECs and 5.58%, 2.65%, 1.67%, 4.02% and 3.13% for Pacific Bell retail in May, June, July, August and September, respectively.

⁴⁷² We note only slight disparities in several other metrics, including the % of Orders Jeopardized (PM 5-524100), % of Due Dates Missed Due to Lack of Facilities (PM 12-Statewide), and the % Troubles in 30 Days for Special Service Orders (PM 16-Statewide). With regard to the % of Orders Jeopardized, the disparity between Pacific Bell's performance for its retail operation and for competitive LECs is less than 2% for any of the relevant months. The comparable numbers for PM 5-524100 were 0.37%, 0.93%, 0.84%, 1.06% and 1.16% for competitive LECs and 0.48%, 0.24%, 0.22%, 0.18% and 0.11% for Pacific Bell retail in May, June, July, August and September, respectively. As for the % of Due Dates Missed Due to Lack of Facilities, the % difference between Pacific Bell's retail operation and the competitive LECs is also less than 2% over the past five months. The comparable numbers for PM 12 – Statewide were 0.76%, 0.94%, 1.07%, 1.58% and 0.98% for competitive LECs and 0.23%, 0.60%, 0.28%, 0.60% and 0.72% for Pacific Bell retail in May, June, July, August and September, respectively. Both of these measures indicate small levels of disparity that are not competitively significant. Finally, with regard to the % Troubles in 30 Days for Special Service Orders metric, we note the recent improvement trend in the August and September data. Specifically, while the disparity in July for this metric was 3.33%, Pacific Bell achieved parity for August and September. The comparable numbers were 9.12%, 8.15%, 9.48%, 10.54% and 11.76% for competitive LECs and 5.09%, 9.28%, 6.15%, 11.35% and 12.21% for Pacific Bell retail in May, June, July, August and September, respectively. We note, that the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparities are small, generally will not result in a finding of checklist noncompliance.

⁴⁷³ *California Commission Order* at 150-51

⁴⁷⁴ PM 11(Statewide) (for both conditioned and non-conditioned linesharing).

⁴⁷⁵ Pacific Bell's performance for installation timeliness and installation quality generally show nondiscriminatory treatment between competitors and Pacific Bell's retail customers for line-shared loops. See PM 11 – Statewide (% of due dates missed); PM 12 – Statewide (% of due dates missed due to lack of facilities); PM 15-1591600 (provisioning trouble reports statewide UNE loop 2 wire digital line sharing out of service); PM 15-1591700 (provisioning trouble reports statewide UNE loop 2 wire digital line sharing service affecting); PM 16 – Statewide (% of troubles in 30 days for special orders – line sharing). In addition, Pacific Bell's performance demonstrates that maintenance and repair measures were generally comparable for competitive LECs and Pacific Bell's retail operation.

line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting.⁴⁷⁶

133. We note that XO contends that Pacific Bell's refusal to offer its DSL service and XO's voice service on the same line is grounds for failing this checklist item.⁴⁷⁷ We reject this claim because, under our rules, the incumbent LEC has no obligation to provide DSL over the competitive LEC's leased facilities.⁴⁷⁸ Furthermore, a UNE-P carrier can compete with an incumbent LECs' combined voice and data offering on the same loop by "splitting" the line itself and offering voice and data service over the UNE-P loop in the same manner." Accordingly, we do not agree with XO that Pacific Bell's policy is discriminatory.

134. *xDSL-Capable Loops, Digital Loops, ISDN Loops, Dark Fiber, and Hot Cuts.* Based on the evidence in the record, we find, as did the California Commission, that Pacific Bell demonstrates that it provides xDSL-capable loops, digital loops, ISDN loops, dark fiber, and hot cuts in accordance with the requirements of checklist item 4.⁴⁸⁰ We note that Pacific Bell consistently satisfies the applicable benchmark or parity standard for the relevant performance metrics with few exceptions.⁴⁸¹ Furthermore, commenters in this proceeding do not criticize Pacific Bell's performance with regard to these specific loops.

C. Checklist Item 5 – Unbundled Local Transport

135. Section 271(c)(2)(B)(v) requires that a BOC provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other

⁴⁷⁶ See Appendix B; see also Pacific Bell Application at 58.

⁴⁷⁷ XO Comments at 23.

⁴⁷⁸ In the *Deployment of Wireline Services Offering Advanced Telecommunications Capability* proceeding, the Commission required unbundling of the high frequency portion of the loop when the incumbent LEC provides voice service, but did not require unbundling of the low frequency portion of the loop and did not obligate incumbent LECs to provide DSL service under the circumstance XO describes here. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999); Third Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 2101, 2109-14, paras. 14-26 (2000); see also *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9100-01, para. 157.

⁴⁷⁹ *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9101, para. 157 (citing *SWBT Texas Order*, 15 FCC Rcd at 18517-18, para. 330.

⁴⁸⁰ *California Commission Order* at 153

⁴⁸¹ See Appendix C

services.⁴⁸² Based on our review of the record, we conclude, as does the California Commission, that Pacific Bell complies with the requirements of this checklist item.⁴⁸³

136. We note that Telscape contends that Pacific Bell fails to comply with checklist item 5 because it “has consistently refused to facilitate Telscape’s requests to carry UNE-P IntraLATA toll calls using shared transport.”⁴⁸⁴ According to Telscape, Pacific Bell’s actions are in violation of the Commission’s requirement that SBC provide competitive LECs the option of using shared transport to route intraLATA toll calls, without restrictions, between their end user customers and customers served by SBC, as specified in the *SBC/Ameritech Merger Order* and the recent *SBC Forfeiture Order*.⁴⁸⁵

137. We disagree with Telscape’s contention that Pacific Bell fails to offer shared transport in a manner that satisfies checklist item 5. As the Commission has explained, an incumbent LEC must provide competitive LECs nondiscriminatory access to the incumbent LEC’s transmission facilities to enable the competitive LECs to provide intraLATA toll service as well as any other type of telecommunications service they may wish to offer.⁴⁸⁶ Pacific Bell states that it provides shared transport for competitive LEC intraLATA toll traffic under its interconnection agreement with AT&T, which **was** arbitrated by the California Commission, and has been available to other requesting carriers since August 14, 2000.⁴⁸⁷ Pacific Bell explains that, under this agreement with AT&T, a competitive LEC may request “Option C” customized routing and, after certain translation work is performed by Pacific Bell, the competitive LEC is

⁴⁸² 47 U.S.C. § 271(c)(2)(B)(v).

⁴⁸³ In previous orders, the Commission has relied on the missed appointment rate to determine whether a BOC is provisioning transport to its competitors in a nondiscriminatory fashion. See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9158, para. 246. Despite a low transport order volume for competitive LECs, Pacific Bell demonstrates compliance with this metric from May through September for each of the relevant submeasures. See Pacific Bell Application at 67; Pacific Bell Application App. A, Vol. I, Tab. 6, Affidavit of William C. Deere (Pacific Bell Deere Aff.), Tab. 12, Pacific Bell Johnson Aff., and Tab 20, Pacific Bell Shannon Aff.. See also *California Commission Order* at 158.

⁴⁸⁴ See Telscape Oct. 18 Ex Parte Lener at 4; Telscape Reply at 5.

⁴⁸⁵ See Telscape Oct. 18 Ex Parte Letter at 4-5 n. 8 (citing *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*SBC/Ameritech Merger Order*), reversed in part on other grounds, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (*ASCENT Decision*) and *SBC Communications, Inc., Apparent Liability for Forfeiture*, FCC 02-7-82 (rel. Oct. 9, 2002) (*SBC Forfeiture Order*)).

⁴⁸⁶ See *SBC Forfeiture Order*, FCC 02-282 at paras. 14 and 18; see also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).

⁴⁸⁷ See Pacific Bell Reply at 62 (citing Opinion. *Application of AT&T Communications of California, Inc. et al., for Arbitration*, D.OO-08-011 (Cal. PUC Aug. 3, 2000) (App. C, Tab 64)).

charged the unbundled network rate(s) for shared transport for the carriage of its intraLATA toll calls over Pacific Bell's facilities.'" While Telscape suggests that Pacific Bell does not "facilitate" Telscape's requests to carry intraLATA toll traffic using shared transport,⁴⁸⁹ it does not explain why Pacific Bell's offering or its conduct does not satisfy its legal obligation.'"

138. We also disagree with Telscape's suggestion that the *SBC/Ameritech Merger Order* and the *SBC Forfeiture Order* indicate noncompliance with this checklist item.'" We note that the *SBC Forfeiture Order* found fault with SBC's offering in Ameritech states, and did not directly address Pacific Bell's offering in California.⁴⁹² Moreover, while that order also commented generally on the shared transport UNE as established in the *UNE Remand Order*, Telscape does not demonstrate that Pacific Bell's arrangement for providing shared transport in its agreement with AT&T fails to satisfy this unbundling requirement. Finally, we take additional assurance from Pacific Bell's recent decision to make available a new, simpler process for allowing competing LECs to use shared transport to route intraLATA toll calls.⁴⁹³ According to Pacific Bell, this offering is functionally equivalent to that provided by SWBT in Texas.⁴⁹⁴

139. ATLT also takes issue with the arrangement for providing shared transport in its agreement with Pacific Bell, suggesting that it actually requires the purchase of *dedicated transport*.⁴⁹⁵ AT&T bases this claim on an observation that there are **no** Access Service Request (ASR) ordering procedures developed and implemented on Pacific Bell's website allowing the

⁴⁸⁸ See Pacific Bell Nov. 13 *Ex Parte* Letter, Attach. at 2.

⁴⁸⁹ See Telscape Oct. 18 *Ex Parte* Letter at 4; Telscape Reply at 5.

⁴⁹⁰ See Telscape Oct. 18 *Ex Parte* Letter at 4; Telscape Nov. 27 *Ex Parte* Letter at 8.

⁴⁹¹ See Telscape Oct. 18 *Ex Parte* Letter at 5; see also Letter from Stephen Gunn, Working Assets Funding Service, Inc., to Chairman Michael K. Powell, Federal Communications Commission, WC Docker No. 02-306, at 1 (filed December 4, 2002).

⁴⁹² See *SBC Forfeiture Order*, FCC 02-282 at para. 4.

⁴⁹³ AT&T contends that this offering is somehow deficient because it requires competitive LECs to pay termination access charges. See AT&T Nov. 26 Haddad/Fetting *Ex Parte* Letter at 13, and Declaration of Eva Fening (AT&T Fetting Decl.) at para. 7. AT&T's concern is misplaced. Pacific Bell correctly points out that whether traffic is delivered over shared transport, dedicated transport, or another carrier's own facilities, the terminating carrier, which is providing local service to the called party, must complete the call through use of its switching capacity. That carrier is entitled to charge terminating access for intraLATA toll traffic it terminates. See Pacific Bell Dec. 6 *Ex Parte* Letter at 3. Accordingly, transport and terminating compensation are distinct functions.

⁴⁹⁴ See Pacific Bell Nov. 13 *Ex Parte* Letter at 2. We note that Pacific Bell introduced this new offering after it filed this application, and after parties filed their initial comments. We need not rely on this offering, however, based on our finding regarding Pacific Bell's shared transport offering contained in its agreement with AT&T, and thus need not address the question of whether we must waive our "complete when filed" rule. See, e.g., *Ameritech Michigan Order*, 12 FCC Rcd at 3320.

⁴⁹⁵ See AT&T Nov. 26 Haddad/Fetting *Ex Parte* Letter at 13, and AT&T Fetting Decl. at paras. 2,6.

ordering of shared transport. Pacific Bell explains, however, that it provides sample ASRs in its handbook simply as examples of potential ordering scenarios.⁴⁹⁶ It further explains that these examples are not exclusive, and certainly should not be read as an indication that shared transport can not be ordered. We find this explanation to be reasonable, and thus find that AT&T's concerns about Pacific Bell's website and handbook do not warrant a finding of checklist noncompliance with respect to this issue.

140. We also note that DIRECTV requests that the Commission consider the reasonableness of the terms and conditions of tariffed interLATA transport services available to broadband service providers once Pacific Bell receives section 271 authority.⁴⁹⁷ As DIRECTV itself acknowledges,⁴⁹⁸ the Commission has previously determined that concerns such as this one, which relate to the reasonableness of Pacific Bell's wholesale tariffs, are beyond the scope of a section 271 proceeding.⁴⁹⁹ We therefore deny DIRECTV's request.

D. Checklist Item 13 – Reciprocal Compensation

141. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."⁵⁰⁰ In turn, section 252(d)(2)(A) specifies when a state commission may consider the terms and conditions for reciprocal compensation to be just and reasonable.⁵⁰¹ Based on the record, we conclude that Pacific Bell demonstrates that it provides reciprocal compensation as required by checklist item 13.

142. We reject PacWest, RCN and TelePacific's allegation that Pacific Bell fails the requirements of this checklist item because it does not provide reciprocal compensation consistent with the Commission's rules.⁵⁰² PacWest and TelePacific assert that they have deployed switches capable of serving geographic areas comparable to the areas served by Pacific Bell's tandem switches, and therefore are entitled to receive reciprocal at the tandem switching rate. These commenters assert that Pacific Bell refuses to compensate them at the tandem switching rate in violation of section 251(b)(5) of the Act.⁵⁰³ Pacific Bell replies that the PacWest and RCN interconnection agreements entitle PacWest and RCN to tandem switching

⁴⁹⁶ See Pacific Bell Dec. 6 *Ex Parte* Letter Attach. at 3.

⁴⁹⁷ See DIRECTV Comments at 7-8.

⁴⁹⁸ See DIRECTV Comments at 8.

⁴⁹⁹ See **BellSouth Georgia/Louisiana Order**, 17 FCC Rcd at 9188-89, para. 305.

⁵⁰⁰ 47 U.S.C. § 271(c)(2)(B)(xiii).

⁵⁰¹ 47 U.S.C. § 252(d)(2)(A).

⁵⁰² PacWest, RCN and TelePacific Comments at 29-30.

⁵⁰³ 47 U.S.C. § 251(b)(5); PacWest, RCN and TelePacific Comments at 29-30.

compensation only where they perform a tandem switching function, which neither of them performs.⁵⁰⁴ Pacific Bell asserts that because these commenters failed to raise the allegation before the California Commission, in the California 271 proceeding or otherwise, and because Pacific Bell filed an application for arbitration on March 29, 2002 with the California Commission to address proposed language for tandem switching compensation under a new interconnection agreement with these parties, the Commission need not address the contract dispute here.⁵⁰⁵ In the *California Commission Order*, the California Commission found that Pacific Bell complies with its reciprocal compensation obligations.⁵⁰⁶

143. To the extent that these parties are unable to resolve this dispute in their ongoing negotiations, we find that this allegation is best resolved before the California Commission. While we do not require parties to raise all pricing issues at the state level before raising them in a section 271 proceeding, it is both impracticable and inappropriate for us to make the fact-specific finding regarding interconnection agreements requested of us in this section 271 review when the issue was not raised below.⁵⁰⁷ As we have stated in prior section 271 orders, although we have an independent obligation to ensure compliance with the checklist, "section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions."⁵⁰⁸ We have confidence in the California Commission's ability to resolve the allegations of PacWest, RCN and TelePacific consistent with our rules. We therefore find that Pacific Bell meets its obligations under checklist item 13.

VI. REMAINING CHECKLIST ITEMS (3, 6-10, 12)

144. In addition to showing that it is in compliance with the requirements discussed above, an applicant under section 271 must demonstrate that it complies with checklist item 3 (access to poles, ducts, and conduits),⁵⁰⁹ item 6 (unbundled local switching),⁵¹⁰ item 7 (911/E911 access and directory assistance/operator services),⁵¹¹ item 8 (white pages),⁵¹² item 9 (numbering

⁵⁰⁴ Pacific Bell Shannon Reply Aff. at para. 17

⁵⁰⁵ *Id.* at para. 18 (citing Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with PacWest Telecomm. Inc. (U5266-C) pursuant to Section 252(b) of the Telecommunications Act of 1996, A.02-02-059 (Apr. 18, 2002)).

⁵⁰⁶ *California Commission Order* at 2 and 208, and Conclusions of Law Nos. 89 and 90

⁵⁰⁷ *Verizon Vermont Order*, 17 FCC Rcd at 7636, para. 20

⁵⁰⁸ *Verizon New Jersey Order*, 17 FCC Rcd at 12354, para. 159 (quoting *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 118); *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20776, para. 115.

⁵⁰⁹ 47 U.S.C. § 271(c)(2)(B)(iii)

⁵¹⁰ 47 U.S.C. § 271 (c)(2)(B)(vi)

⁵¹¹ 47 U.S.C. § 271(c)(2)(B)(vii)

⁵¹² 47 U.S.C. § 271(c)(2)(B)(viii).

administration),” item 10 (databases and signaling),⁵¹⁴ and item 12 (dialing parity).” Based on the evidence in the record, we conclude, as did the California Commission, that Pacific Bell demonstrates that it is in compliance with these checklist items.⁵¹⁶ No parties objected to Pacific Bell’s compliance with these checklist items.

⁵¹³ 47 U.S.C. § 271(c)(2)(B)(ix).

⁵¹⁴ 47 U.S.C. § 271(c)(2)(B)(x).

⁵¹⁵ 47 U.S.C. § 271(c)(2)(B)(xii).

⁵¹⁶ See *California Commission Order* at 125 (checklist item 3), 169 (checklist item 6), 176 (checklist item 7), 182 (checklist item 8), 186-87 (checklist item 9), 192 (checklist item 10), and 204 (checklist item 12).

VII. SECTION 272 COMPLIANCE

145. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."⁵¹⁷ Pacific Bell provides evidence that it maintains the same structural separation and nondiscrimination safeguards in California as it does in Texas, Missouri, Arkansas, Kansas, and Oklahoma where SBC has already received section 271 authority.⁵¹⁸ Pacific Bell also states, among other things, that it will operate independently of its section 272 affiliate, which will have separate officers, directors and employees and will maintain separate books, records, and accounts.⁵¹⁹ Pacific Bell also states that it will conduct all transactions with its section 272 affiliate on an arm-length basis, with the transactions reduced to writing, open to public inspection, and accounted for in accordance with accounting principles and rules approved by the Commission.⁵²⁰ Finally, Pacific Bell states that it will obtain and pay for a joint Federal/State biennial audit performed by an independent auditor to determine whether it has complied with the section 272 and the rules promulgated under it.⁵²¹ Based on the record before us, we conclude that Pacific Bell has demonstrated that it will comply with the requirements of section 272.⁵²²

146. AT&T raises concerns about Pacific Bell's compliance with section 272 making certain allegations based on an audit performed by Overland Consulting for the California Commission to monitor its New Regulatory Framework (NRF).⁵²³ Based on certain findings in

⁵¹⁷ 47 U.S.C. § 271(d)(3)(B).

⁵¹⁸ See Pacific Bell Application App. A., Vol. 1, Tab 2, Affidavit of Joe Carrisalez (Pacific Bell Carrisalez Aff.) at para. 5; Pacific Bell Application App. A., Vol. 2a, Tab 9, Affidavit of Robert Henrichs (Pacific Bell Henrichs Aff.) at para. 9; Pacific Bell Application App. A., Vol. 5, Tab 24, Affidavit of Linda G. Yohe (Pacific Bell Yohe Aff.) at para. 7. See also *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20780-81, paras. 122-23; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6370-74, paras. 256-65; *SWBT Texas Order*, 15 FCC Rcd at 18548-57, paras. 394-415.

⁵¹⁹ Pacific Bell Application at 102-109.

⁵²⁰ *Id.*

⁵²¹ Pacific Bell Application at 106-107. Ernst & Young has completed the first independent audit of SBC's section 272 compliance pursuant to section 53.209 of the Commission's rules. 47 C.F.R. § 53.209. See Letter from Brian Horst, Partner, Ernst & Young, to Marlene H. Dortch, Secretary, Federal Communication Commission (September 16, 2002)(transmitting audit report).

⁵²² See Pacific Bell Carrisalez Aff. at Tab 2; Pacific Bell Henrichs Aff. at Tab 9; Pacific Bell Yohe Aff. at Tab 24.
⁵²³

See AT&T Comments at 55-68. Overland Consulting, *Regulatory Audit of Pacific Bell For The Years 1997, 1998, and 1999*, Feb. 21, 2002 (Overland Report). The NRF is an incentive-based regulatory framework adopted by the California Commission in 1989 for Pacific Bell and Verizon California (then CTE California, Inc.). *Re Alternative Regulatory Frameworks for Local Exchange Carriers (NRF Decision)*, 33 CPUC 2nd 43, D.89-10-03 I, Oct. 12, 1989.

the Overland Report, AT&T contends that Pacific Bell will not comply with section 272.⁵²⁴ We disagree with AT&T's claim that these findings demonstrate that Pacific Bell will not, in fact, comply with section 272 on a going-forward basis. As an initial matter, we note that the audit did not address Pacific Bell's compliance with section 272, nor was its purpose to consider transactions with the section 272 affiliate established to offer long distance service in California, and which currently operates in other SBC states.⁵²⁵ Rather the "report was prepared to document Pacific Bell's compliance with [California Commission] requirements and related internal controls, to identify issues of regulatory concern in specific areas, and to develop recommendations for the [California Commission]."⁵²⁶ Also, the audit covered Pacific Bell's compliance with the NRF during the three year period 1997-1999, which pre-dates SBC's offering of long distance service in any of its in-region states.⁵²⁷ Accordingly, none of the auditor's specific findings relate to Pacific Bell's compliance with section 272, or its relationship with its separate long distance affiliate.⁵²⁸ Moreover, we recognize that the California Commission is still reviewing the report and has not yet adopted it,⁵²⁹ and thus may even reach a different conclusion regarding Pacific Bell's compliance with the state requirements under review." We thus conclude that none of the report's findings undermine Pacific Bell's showing

⁵²⁴ AT&T Comments at 55-56; AT&T November 26 Haddad *Ex Parte* Letter at 7-9.

⁵²⁵ See Pacific Bell Reply at 54; Pacific Bell Borsodi Reply Aff. at para. 6; Overland Report at I-1. The Overland Report does refer to "SBC Services" in several places. These references, however, are to Pacific Bell's administrative support shared services affiliate, not to its long distance affiliate, which is Southwestern Bell Communications Service, Inc. (SBCS). Pacific Bell Borsodi Reply Aff. at para. 6 n.3. Pacific Bell does note that the Overland Report mentions SBCS in a supplemental report, but not as an integral part of the report. Pacific Bell Reply at 54 n.43; Pacific Bell Borsodi Reply Aff. at para. 10.

⁵²⁶ Letter from Howard E. Lubow, President, Overland Consulting, to Jack Leutza, Director - Telecommunications Division, California Public Utilities Commission (February 21, 2002) (transmitting audit report). The "general objective" of the audit was to "provide current, relevant information regarding Pacific Bell's operational and financial processes to assist the [California Commission] in regulation." Overland Report, Attach. 2-2, Development of Audit Scope and Objectives at 1 (quoting from the Request for Proposal to perform the audit issued by the California Office of Ratepayer Advocates).

⁵²⁷ See *SWBT Texas Order*, 15 FCC Rcd at 18354 (authorizing long distance service provided by its separate section 272 affiliate in June, 2002).

⁵²⁸ Among other things, the Overland Report found that Pacific underreported net regulated operating revenues to the California Commission, that it engaged in improper cross-subsidizations, that it violated the California Commission's affiliate transaction rules, and that it delayed the audit by withholding information. AT&T relies on these specific findings to support its claim the Pacific Bell will not comply with section 272. AT&T Comments at 56.

⁵²⁹ Pacific Bell Application Reply App., Tab 2, Reply Affidavit of Emery G. Borsodi (Pacific Bell Borsodi Reply Aff.) at paras. 8, 15. The *California Commission Order* does not address its ongoing review of the Overland Report.

⁵³⁰ Indeed, as described in our discussion of the public interest, *infra*, the California Commission recently issued a draft final decision concluding its review of Pacific Bell's state public interest compliance process in which it finds that its record supports the determinations that there is no improper cross subsidization by Pacific Bell, that there is no finding of anticompetitive behavior by Pacific Bell, and that there is no substantial possibility of harm to the (continued...)

that it will comply with section 272. Finally, we disagree with AT&T's allegation that Pacific Bell will obstruct and delay the section 272 biennial audit based on its alleged conduct in the California proceeding.” Pacific Bell will be required to comply with the requirements and timetable established by the Commission in sections 53.209, 53.211, and 53.213 of its rules to conduct the section 272 audits.”

VIII. PUBLIC INTEREST ANALYSIS

A. Public Interest Test

147. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.” At the same time, section 271(d)(4) of the Act states that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).”⁵³¹ Accordingly, although the Commission must make a separate determination that approval of a section 271 application is “consistent with the public interest, convenience, and necessity,” it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

148. We conclude that approval of this application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in California's local exchange market have been removed, and that the local exchange market is open to competition.

B. Price Squeeze

149. We find that the evidence submitted by XO, PacWest, RCN, TelePacific, DIRECTV, and Ernest that Pacific Bell is engaged in three distinct price squeezes in California does not support a finding that Pacific Bell fails its public interest requirements. We conclude that none of these commenters has successfully established the existence of a price squeeze.

(Continued from previous page) _____
Competitive intrastate interexchange market by Pacific Bell's entry into that market. *See Draft Final Decision on the Public Utilities Code Section 709.2(c) Inquiry.*

⁵³¹ AT&T Comments at 62-64; AT&T Reply at 43; AT&T November 26 Haddad *Ex Parte* Letter at 9.

⁵³² 47 C.F.R. §§ 53.209, 53.211, 53.213

⁵³³ 47 U.S.C. § 271(d)(3)(C).

⁵³⁴ 47 U.S.C. § 271(d)(4).

With respect to PacWest, RCN, TelePacific, DIRECTV, Ernest, and AT&T's allegations, we also conclude that Pacific Bell's pricing of DSL and payphone services at issue here is not relevant under the competitive checklist requirements.

150. Before analyzing the commenters' price squeeze allegations, we begin with a discussion of a pending remand on the issue of how allegations of a price squeeze should be considered under the public interest standard of section 271(d)(3)(C). In *Sprint v. FCC*, the Court of Appeals for the D.C. Circuit remanded to the Commission for further consideration of how allegations of a price squeeze by a BOC should be examined as part of a section 271 application's public interest analysis.⁵³⁵ In the Commission's *SWBT Kansas/Oklahoma Order*, the subject of *Sprint v. FCC*, the Commission declined to consider allegations that approving a section 271 application would not be in the public interest because competitors are unable to make a profit in the residential market using the UNE-platform.⁵³⁶ The Commission concluded that the Act requires us to consider whether rates are cost-based, not whether market entry is profitable.⁵³⁷ The Commission also stated that, if it were to focus on profitability, it would have to consider a state's retail rates,⁵³⁸ which are generally outside its jurisdictional authority. Appellants asserted that their inability to make a profit in the residential market showed that granting the BOC's section 271 application was not in the public interest.⁵³⁹ The court concluded that the Commission's rejection of the appellants' profitability argument was not responsive to the appellants' public interest argument.⁵⁴⁰ The court did not, however, vacate the order. Instead, it remanded the Commission's rejection of the price squeeze issue for reconsideration.⁵⁴¹

151. The Commission intends to issue an order addressing the questions posed in *Sprint v. FCC* about how we should consider allegations of a price squeeze that are raised in section 271 proceedings. Because we have not yet addressed the issues remanded by the court, however, we consider the specific allegations presented by the parties in this proceeding.

152. In a review of a section 271 application, the public interest requirement is an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as

⁵³⁵ *Sprint v. FCC*, 274 F.3d 549.

⁵³⁶ *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6269, para. 65, 6280-81, para. 92.

⁵³⁷ *Id.* at 6280-81, para. 92.

⁵³⁸ *Id.*

⁵³⁹ *Sprint v. FCC*, 274 F.3d at 553.

⁵⁴⁰ *Id.* at 554.

⁵⁴¹ *Id.* at 556.

Congress expected.⁵⁴² Congress did, however, explicitly prohibit the Commission from enlarging the scope of the competitive checklist.”⁵⁴³ Accordingly, consistent with our statutory obligation, we will consider the existence and scope of the alleged price squeezes along with all other relevant public interest factors.

153. XO claims that Pacific Bell’s prices for **DSI** and DS3 UNE loops effect a price squeeze on competitors, because in certain cases Pacific Bell’s UNE rates for DS1 and DS3 loops are substantially higher than its retail rates for these loops.”⁵⁴⁴ XO contends that Pacific Bell’s UNE rates effectively preclude competitors from achieving any profits at all for certain services and market segments.⁵⁴⁵ XO claims that these UNE rates prevent competition against Pacific Bell in the market for these services.⁵⁴⁶ Pacific Bell replies that XO not only failed to provide the necessary detailed analysis to establish a price squeeze, but that XO’s DS1 and DS3 price squeeze allegation is “absurd” given the high level of competition in the provision of these high-speed services.⁵⁴⁷

154. The factual information necessary to conduct a price squeeze analysis is highly complex. Courts have recognized the particular difficulty of conducting a price squeeze inquiry in a regulated industry.⁵⁴⁸ The key elements of a price squeeze inquiry -- input costs, revenues, and internal costs -- depend on numerous variables,⁵⁴⁹ none of which are discussed or otherwise analyzed in XO’s comments. XO fails to address any of the factors that we have identified in past orders as relevant to a price squeeze analysis. XO does not provide an analysis to demonstrate the internal costs of an efficient competitor, or alternative ways to provide service (i.e., resale).” **Also**, XO neither analyzes other revenues that may be available to competitors nor addresses the fact that competition exists in this market from other companies offering high-speed services.⁵⁵¹ Additionally, we note that Pacific Bell voluntarily reduced its DS3 loop rate to

⁵⁴² *Verizon New Hampshire/Delaware Order* at para. 144 (citing *Bell Atlantic New York Order*, 15 FCC Rcd at 4161-62, paras. 423-24).

⁵⁴³ 41 U.S.C. § 271(d)(4); *see also Verizon New Hampshire/Delaware Order* at para. 144

⁵⁴⁴ XO Comments at 32.

⁵⁴⁵ *Id.* at 32.

⁵⁴⁶ *Id.* at 32-33

⁵⁴⁷ Pacific Bell Reply at 46-49; *see also id.* at Tab 4, Affidavit of Robert W. Crandall (Pacific Bell Crandall Reply Aff.) at para. 24.

⁵⁴⁸ *Concord Massachusetts v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990)

⁵⁴⁹ *See BellSouth Multistate Order* at para. 281; *Verizon New Hampshire/Delaware Order* at para. 154

⁵⁵⁰ *See BellSouth Multistate Order* at para. 285

⁵⁵¹ *See Verizon New Hampshire/Delaware Order* at paras. 155-56; *BellSouth Multistate Order* at para. 285 (citing *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20751, para. 66).

the rate it is proposing to the California Commission as part of its *Relook Proceeding*.” This further undermines XO’s assertion that Pacific Bell’s high rates preclude competition. Accordingly, as we have found in previous orders,” we find that XO provides insufficient evidence to determine that a price squeeze exists in the DSL and DS3 markets in California.

155. PacWest, RCN, TelePacific, DIRECTV, and AT&T allege that Pacific Bell, through its affiliated companies, is engaging in a price squeeze by charging approximately \$10.00 more per month for wholesale DSL service than it currently offers to retail customers for DSL-based Internet access service.” These carriers allege that Pacific Bell’s wholesale DSL rates do not permit viable competition.⁵⁵⁵ Commenters claim that in comparison to the \$29.95 monthly promotional rate offered on a retail basis by Pacific Bell’s affiliated ISPs, ASI (Pacific Bell’s advanced services affiliate) provides wholesale ADSL access services and transport for more than \$40.00 per end-user DSL customer.⁵⁵⁶ Pacific Bell responds that pricing of DSL service is irrelevant to the Commission’s public interest standard.” Also, Pacific Bell asserts that these commenters fail to provide the detailed analysis necessary to establish a price squeeze and that a price squeeze in the DSL market would be implausible given the high level of competition in the provision of this service.⁵⁵⁸

156. Pacific Bell does not have a present obligation to offer DSL transport service under section 251 or 252.⁵⁵⁹ ASI’s wholesale DSL transport services are offered at federally-tariffed rates.⁵⁶⁰ In addition, no commenter addresses any of the factors necessary for us to conduct a price-squeeze analysis discussed above, such as input costs, revenues, or an efficient competitor’s internal costs. Furthermore, commenters fail to consider how alternative modes of entry, e.g., the UNE-P, which enables a carrier to lease the entire line for less than \$20 a month, affect the price-squeeze analysis.” For these reasons, we find that commenters fail to

⁵⁵² Pacific Bell Reply at 26

⁵⁵¹ See *Verizon New Jersey Order*, 17 FCC Rcd at 12362, para. 175; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9181, para. 290; *Verizon Vermont Order*, 17 FCC Rcd at 7665, para. 7j; *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20751, para. 66.

⁵⁵⁴ PacWest, RCN and TelePacific Comments at ii and 27-28; DIRECTV Comments at I and 4-7; Lener from James P. Young, Counsel for AT&T, to Marlene H. Donch, Secretary, Federal Communications Commission, WC Docket No. 02-306 at 1-2 (filed Nov. 26, 2002) (*AT&T November 26 Young Ex Parte Lener*).

⁵⁵⁵ *Id.* at 29.

⁵⁵⁶ *Id.* at 27-28 (citing ASI FCC Tariff No. 1 at §§ 4 *et seq.*).

⁵⁵⁷ Pacific Bell Reply at 45-46.

⁵⁵⁸ *Id.* at 46-48

⁵⁵⁹ See 47 U.S.C. §§ 251(c)(2), (c)(4), and 252(d). See also section IV(c), *supra*.

⁵⁶⁰ See Pacific Bell Application App. A, Tab 8, Affidavit of John S. Habeeb (Pacific Bell Habeeb Aff.) at para. 16.

⁵⁶¹ See section IV(A)(1)(b)(ii), *supra*.

demonstrate that Pacific Bell is engaged in a price squeeze through its provision of DSL transport in violation of the public interest when we have never found that it is required under any checklist item to offer DSL transport services at a wholesale discount.⁵⁶²

157. Ernest asserts that Pacific Bell “appears” to be engaged in a price squeeze that will preclude competitors from serving the pay telephone line market in California.⁵⁶³ Ernest contends that Pacific Bell is offering payphone service providers (PSPs) retail rates that are below what Ernest, as an unbundled network element provider, must pay Pacific Bell for the network elements that Ernest requires to provide comparable service.⁵⁶⁴ Pacific Bell replies that the Commission need not address Ernest’s payphone pricing assertions in this proceeding because it did not raise the issue in the California 271 proceeding, because this pricing issue has nothing to do with checklist compliance, and because this issue is currently the subject of a pending complaint filed by MPower with the California Commission.” Pacific Bell also responds that it could not rationally engage in a price squeeze against payphone rivals because it would be unable to recoup the losses from such a pricing strategy, given that it alleges that the payphone industry is a dying business that is rapidly being replaced by personal wireless communications.⁵⁶⁵

158. We find that Ernest provides the Commission with none of the detailed analysis needed to establish a price squeeze. Indeed, Ernest acknowledges that it is not “in a position to provide . . . [the] detailed price squeeze analysis” required by the Commission in its previous orders.⁵⁶⁶ In addition, in light of the pending complaint filed by MPower, we agree with Pacific Bell that this payphone pricing issue is best resolved by the California Commission. **As** we have stated in prior section 271 orders, although we have an independent obligation to ensure compliance with the checklist, “section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions.”⁵⁶⁷ We are confident that the California Commission will resolve this issue consistent with our rules.

159. We further note that Pacific Bell’s intrastate payphone line rates are subject to the Commission’s pricing guidelines. Specifically, in *Wisconsin Public Service Commission*, the

⁵⁶² We note that the appropriate venue for the price squeeze allegation raised by AT&T, PacWest, RCN, TelePacific, and DIRECTV is a complaint under section 208 of the Act. 47 U.S.C. § 208.

⁵⁶³ Ernest Comments at 1.

⁵⁶⁴ *Id.* at 2.

⁵⁶⁵ Pacific Bell Shannon Reply Aff. at paras. 22-26.

⁵⁶⁶ Pacific Bell Reply at 48; *see also id.* Crandall Aff. at paras. 20-24.

⁵⁶⁷ Ernest Comments at 2.

⁵⁶⁸ *Verizon New Jersey Order*, 17 FCC Rcd at 12354, para. 159 (quoting *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 118); *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20776, para. 115.

Commission determined that section 276 of the 1996 Act requires that the BOCs' intrastate payphone line rates comply with the cost-based "new services test" and that these rates be calculated using a forward-looking, direct cost methodology such as TELRIC.⁵⁶⁹ Because these pricing guidelines allow independent payphone providers to purchase lines from Pacific Bell based on a pricing standard similar, if not identical, to that used by Ernest to purchase UNEs, we would expect that competitive LECs that are not providing their own facilities might often have difficulty in competing with BOCs in providing services to independent payphone providers. Given that the interest in promoting competition between independent payphone providers and incumbent LEC payphone operations set forth in section 276 may at times run counter to the interest of competition in serving the niche market of independent payphone providers, we find that the interest explicitly identified by statute takes precedence. We therefore find that Ernest's allegations do not cause Pacific Bell to violate its public interest requirements.

C. Assurance of Future Compliance

160. We find that the performance incentives plan (PIP) currently in place for California provides assurance that the local markets will remain open after Pacific Bell receives section 271 authorization.⁵⁷⁰ Although it is not a requirement for section 271 approval that a BOC be subject to such post-entry performance assurance mechanisms, the Commission has previously found that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations."

161. We conclude that the Pacific Bell PIP plan provides sufficient incentives to foster post-entry checklist compliance. We note that the PIP was developed and approved by the California Commission in an open proceeding and Pacific Bell's performance measurements are the result of extensive collaborative negotiations among the competitive LECs, the California Commission, and Pacific Bell.⁵⁷² As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance assurance plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing

⁵⁶⁹ *Wisconsin Public Service Commission*, CCB/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2072, para. 68 (2002).

⁵⁷⁰ *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-398. We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to a performance assurance plan designed to protect against backsliding after BOC entry into the long-distance market.

⁵⁷¹ See *Verizon New Jersey Order*, 17 FCC Rcd at 12362, para 176; *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 353-98.

⁵⁷² *Pacific Bell Johnson Aff.* at para. 13; *California Commission Order* at 221

nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.⁵⁷³

162. We disagree with XO's concern that the PIP is insufficient to deter backsliding.⁵⁷⁴ The California PIP is overseen by the California Commission and includes reporting requirements that track Pacific Bell's performance on 5 measurements,⁵⁷⁵ as well as incentive payments that subject Pacific Bell to up to \$50 million of liability each month if it fails to provide nondiscriminatory service to competitive LECs.⁵⁷⁶ The \$50 million liability each month satisfies the California Commission's overall annual cap of 36% of Pacific Bell's annual net return from local exchange service in California.⁵⁷⁷ Consequently, the PIP should play a key role in swiftly detected and sanctioning any post entry backsliding. We also note that the PIP **is** not the only means of ensuring that Pacific Bell continues to provide nondiscriminatory service to competing carriers. In addition to the monetary payments at stake under this plan, Pacific Bell faces other consequences if it fails **to** sustain an acceptable level of service to competing carriers, including: enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6) and remedies associated with antitrust and other legal actions.⁵⁷⁸

163. Further, we reject XO's contention that the PIP's "curvilinear" structure unduly limits the payments for which Pacific Bell is liable, and therefore limits the efficacy of the plan.⁵⁷⁹ Rather, as the California Commission found, the incentive amounts are scaled to performance in a curvilinear structure in order to ensure that payments remain low when Pacific Bell's service quality is strong, but ratchet-up quickly when service quality deteriorates.⁵⁸⁰ In the curvilinear plan, the per-failure payment amount increases as Pacific Bell "misses" more measure.⁵⁸¹ Thus, monetary liabilities mount as performance worsens. Moreover, the California Commission will maintain vigilant oversight of the PIP. In its Plan Opinion, the California

⁵⁷³ See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9121-25, paras. 240-247; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6377-81, paras. 273-78.

⁵⁷⁴ XO Comments at 29

⁵⁷⁵ *California Commission Order* at 224

⁵⁷⁶ Pacific Bell Reply at 49

⁵⁷⁷ *California Commission Order* at 227-28

⁵⁷⁸ See *Bell Atlantic New York Order*, 15 FCC Rcd at 4165, para. 430 (stating that the BOC "risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner"); see also *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421

⁵⁷⁹ XO Comments at 30

⁵⁸⁰ See Pacific Bell Johnson Aff. at paras. 234-35; see also *California Commission Order* at 228. See also *Before the California Utilities Commission of the State of California: Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company* D.02-03-023 at 38. (PIP Plan Opinion).

⁵⁸¹ Pacific Bell Reply Affidavit of Cynthia Wales, Tab 18 (Pacific Bell Wales Reply Aff.) at para. 79

Commission ordered that after an initial period of six months, the performance of the PIP shall be reviewed by the California Commission and shall include any adjustments and modifications to the components, if necessary.’*’

164. *Other Issues.* Finally, we disagree with Sprint’s comments that assert that under our public interest standard we must consider the level of competitive LEC market share, the weakening economy, or the financing difficulties of competitive LECs.⁵⁸³ We have consistently declined to use factors beyond the control of the BOC or competitive LECs, such as the weak economy, or over-investment and poor business planning by competitive LECs to deny an application.”⁵⁸⁴ We note that the D.C. Circuit confirmed in *Sprint v. FCC* that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.”⁵⁸⁵

D. Section 709.2 of the California Public Utilities Code

165. Several commenters argue that the Commission should reject Pacific Bell’s application because of the California Commission’s findings that Pacific Bell failed to meet the requirements under California Public Utilities Code section 709.2 for the provision of intrastate interexchange telecommunications services.⁵⁸⁶ The commenters allege that because the California Commission found that Pacific Bell failed to satisfy several prongs of section 709.2, those findings alone provide sufficient evidence that Pacific Bell’s entrance into the long distance market in California is not in the public interest.⁵⁸⁷ They also argue that facts or circumstances relied upon by the California Commission are relevant to our analysis and warrant a finding that Pacific Bell’s request fails our public interest requirement.⁵⁸⁸ In response, Pacific Bell states that section 709.2 is irrelevant to this Commission’s section 271 determination, and even if it was relevant, the California Commission wrongly determined that Pacific Bell failed to meet section 709.2.⁵⁸⁹

166. Section 709.2 was enacted by the California legislature in 1994 and requires the California Commission to make *four* essential determinations prior to “authorizing or directing

⁵⁸² Pacific Bell Wales Reply Aff. at para 84

⁵⁸³ Sprint Comments at 4-9 (asserting that we must consider the financial status of the competitive LEC industry.)

⁵⁸⁴ See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17487, para. 126

⁵⁸⁵ *Sprint v. FCC*, 274 F.3d at 559; see also *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 17.

⁵⁸⁶ See, e.g., AT&T Comments at 71-73; Vycera Comments at 19-21; XO Comments at 27-29; PacWest Comments at 4-12; Sprint Comments at 10-13; Paging Systems Comments at 7-10.

⁵⁸⁷ See, e.g., AT&T Comments at 72-73; Vycera Comments at 21; XO Comments at 27.

⁵⁸⁸ See, e.g., AT&T Comments at 72-73; XO Comments at 29; PacWest Comments at 34.

⁵⁸⁹ Pacific Bell Application at 95-101.

competition” in the intrastate interLATA market.⁵⁹⁰ Specifically, the California Commission is required to find that: (1) competitors have fair, nondiscriminatory access to exchanges; (2) there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or subscriber contacts generated by the provision of local exchange telephone service; (3) there is no improper cross-subsidization of interexchange telecommunications service; and (4) there is “no substantial possibility of harm” to the competitive intrastate interexchange telecommunications market.⁵⁹¹ The California Commission concluded that the record did not support the finding that Pacific Bell had satisfied the second, third and fourth parts of the statute.⁵⁹² Specifically, the California Commission identified evidence of Pacific Bell’s behavior contrary to section 709.2, such as Pacific Bell’s joint marketing plans,⁵⁹³ under which it could potentially use its current relationships with customers to its advantage.”⁵⁹⁴ In addition, the California Commission stated that while it did not have actual evidence of improper cross-subsidization, the possibility existed for such conduct to occur in the future.⁵⁹⁵ The California Commission also noted that, because Pacific Bell was going to be the Preferred Interexchange Carrier (PIC) administrator, it would have the ability to behave in a way that could harm competitors and potentially harm the competitive intrastate interexchange telecommunications market.⁵⁹⁶ Accordingly, the California Commission concluded that Pacific Bell failed to meet the requirements of section 709.2.⁵⁹⁷

167. On December 12, 2002, an Administrative Law Judge (ALJ) appointed by the California Commission issued a draft decision proposing to conclude the section 709.2 inquiry. The ALJ determined that, with the implementation of certain additional safeguards, Pacific Bell had satisfied the remaining three parts of section 709.2.⁵⁹⁸ Accordingly, the draft decision proposes to allow Pacific Bell the authority to offer intrastate interexchange telecommunications services “provided that it has received full authorization from the FCC pursuant to Section 271 of

⁵⁹⁰ Calif. Pub. Util. Code § 709.2(c).

⁵⁹¹ Calif. Pub. Util. Code § 709.2(c)(1)-(4)

⁵⁹² *California Commission Order* at 245-61

⁵⁹³ The California Commission concluded (contrary to the 1996 Act and the Commission’s regulations) that permitting Pacific Bell to jointly market its long distance affiliate’s services to incoming callers would be a harmful and discriminatory advantage. *California Commission Order* at 248-49.

⁵⁹⁴ *California Commission Order* at 248-49

⁵⁹⁵ *California Commission Order* at 258

⁵⁹⁶ *California Commission Order* at 261-63

⁵⁹⁷ *California Commission Order* at 263

⁵⁹⁸ See Pacific Bell Dec. 13 Ex Parte Letter, Attach 2, at 2. Specifically, the draft decision proposes to require ongoing review of Pacific Bell’s joint marketing scripts, to complete development of an expedited dispute resolution process, and to monitor Pacific Bell’s special access performance. *Id.* at 16-22.

the Telecommunications Act of 1996.”⁵⁹⁹ Nonetheless, at this point the draft decision does not represent a final action of the California Commission, and does not alter the earlier determinations contained in the California Commission’s September 19, 2002 Order (the “California Commission Order”), discussed above.⁶⁰⁰ Comments on the draft decision are due by December 24.

168. As an initial matter, we are not bound by the precise requirements of section 709.2. Congress granted the Commission exclusive authority to determine whether a BOC may provide interLATA services – including both interstate and intrastate services – and identified the findings the Commission must make before it grants a section 271 application.” In the *Non-Accounting Safeguards Order*, moreover, we determined that “sections 271 and 272, and the Commission’s authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates,” and that “the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272.”⁶⁰² We also note that a state retains authority to enforce obligations and safeguards relating to a BOC’s provision of intrastate interLATA services, such as those governing consumer protection and service quality.” In addition, a state retains authority to enforce safeguards that promote a pro-competitive telecommunications market, to the extent that they are not inconsistent with federal requirements. However, this Commission retains the authority to determine whether a BOC remains in compliance with the requirements of section 271.

169. As we noted at the beginning of the public interest section of this Order, section 271(d)(3)(C) of the 1996 Act states that the Commission shall not approve a requested authorization to provide in-region, interLATA services unless “the requested authorization is consistent with the public interest, convenience, and necessity.”⁶⁰⁴ In discharging this obligation, we must be mindful that the standard applied is a federal one, as set forth in the 1996 Act. The Commission has, accordingly, developed a significant body of precedent regarding the factors we have considered in making public interest findings for the purposes of section 271.⁶⁰⁵ Although

⁵⁹⁹ See Pacific Bell Dec. 13 Ex Parte Letter, Attach 2, at 23.

⁶⁰⁰ The ALJ explained that the California Commission may adopt all or part of the draft decision as written, amend or modify it, or set it aside and prepare its own decision. See Pacific Bell Dec. 13 Ex Parte Letter, Attach 2, at 1.

⁶⁰¹ See 47 U.S.C. § 271(a) (a BOC may not “provide interLATA services except as provided in this section”); *id.* § 271(b)(1) (“A Bell operating company...may provide interLATA services originating in any of its in-region States... if the Commission approves the application of such company for such State under subsection (d)(3)”).

⁶⁰² *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21929, para. 47 (1996).

⁶⁰³ See *id.* at n.97.

⁶⁰⁴ 47 U.S.C. § 271(d)(3)(C)

⁶⁰⁵ See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 416-1-72, paras. 422-43; *SWBT Texas Order*, 15 FCC Rcd at 18557-65, paras. 416-30.

there is no requirement in the statute for the Commission to consult with a state or otherwise follow its determinations on the public interest,⁶⁰⁶ we rely on the state commission as the initial fact finder. The state commission is able to cross examine witnesses, compel discovery, and direct the submission of additional record evidence on particular issues. The Commission lacks the time to employ such tools during the course of the 90-day statutory review period. We also recognize that the Commission, in conducting its public interest analysis, may not extend the terms of the competitive checklist.⁶⁰⁷ Therefore, to the extent the California Commission's discussion of section 709.2 raises public interest considerations relevant to our section 271 analysis in this proceeding, we take seriously the findings of the California Commission and address them below.

170. **As** a general matter, then, we do not agree with certain commenters that we should simply reject this application based solely on the fact that the California Commission concluded Pacific Bell failed to meet state law requirements.⁶⁰⁸ In particular, we do not consider the California Commission's conclusion under section 709.2 alone to be determinative of our own public interest analysis for several reasons. First, we note that section 709.2 is a state statute enacted several years before the 1996 Act, and section 709.2 provides a different framework for determining whether Pacific Bell can enter the intrastate interexchange market that is somewhat inconsistent with the approach in section 271.⁶⁰⁹ For instance, section 271 explicitly permits joint marketing under certain circumstances, yet the California Commission did not consider this in its analysis of the state requirements (nor does section 709.2 require it to).⁶¹⁰ Second, while the California statute requires a determination of "no improper cross-subsidization of intrastate interexchange telecommunications service," the 1996 Act requires the BOC to comply with the structural safeguards of section 272 of the Act, which includes establishing a separate long distance subsidiary.⁶¹¹ Because of the differences between section 709.2 and the relevant sections of the 1996 Act, and as discussed in more detail below, we conclude that the California Commission's determinations with regard to section 709.2 do not compel any particular outcome of our public interest determination under the 1996 Act. We conclude that the 1996 Act is

⁶⁰⁶ See 47 U.S.C. § 271(d)(2)(B).

⁶⁰⁷ See 47 U.S.C. § 271(d)(4).

⁶⁰⁸ See, e.g., AT&T Comments at 69; XO Comments at 27; PacWest Comments at 6.

⁶⁰⁹ See, e.g. letter from Jim Costa, California State Senator, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-306 (filed October 18, 2002) (Costa October 18 *Ex Parte* Letter). As the original author of Section 709.2 while a member of the California State Assembly, Mr. Costa submitted an *Ex Parte* letter stating that Section 709.2 was not intended to stand as a barrier to FCC approval of Pacific Bell's long distance application, and "if the FCC concludes that Pacific Bell meets the federal statutory requirements for relief, then the company meets the requirements of Section 709.2."

⁶¹⁰ See 47 U.S.C. § 271(e)(1).

⁶¹¹ 47 U.S.C. § 272

paramount to any state statute in determining whether Pacific Bell's section 271 application is in the public interest.

171. Nonetheless, while the California Commission's findings under state law do not compel any particular result, we do not agree with Pacific Bell that the specific issues raised by the California Commission and cited by commenters are irrelevant to our public interest inquiry.⁶¹² Indeed, our precedent in this area clearly states that evidence of a BOC's failure to comply with state telecommunications regulations could undermine our confidence that a BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.⁶¹³ Therefore, we fully consider the specific facts and circumstances identified by the California Commission, to the extent these facts and circumstances are stated with clarity in our record, because they could independently establish a public interest concern separately cognizable by this Commission in its review. We thus address the specific facts and circumstances underlying the California Commission's analysis—and highlighted by the commenters in this proceeding.

172. We disagree with the several commenters that suggest that Pacific Bell failed to cooperate in opening its network to competitors by engaging in a pattern of anticompetitive conduct. The record in this proceeding does not support such a finding. Commenters raise two key issues with respect to their position that Pacific Bell engages in anticompetitive behavior. First, commenters note that Pacific Bell plans to jointly market its services to inbound callers.⁶¹⁴ While the California Commission finds this activity to be “unfair” usage of subscriber information or customer contacts, federal law specifically permits Pacific Bell to jointly market its long distance service to inbound callers once it obtains authority to provide in-region, interLATA services within a state.⁶¹⁵ Indeed, this Commission has found that where joint marketing is conducted pursuant to the statute and Commission rules, such activity is fully consistent with the public interest.⁶¹⁶ No party disputes that Pacific Bell's joint marketing plans comply with federal law and the California Commission does not contend otherwise. We therefore decline to find that Pacific Bell's entry into the interLATA market is not in the public interest when Congress clearly established that this activity can benefit consumers and is otherwise consistent with the public interest. Second, commenters note the California Commission's concerns relating to two cases filed against Pacific Bell regarding its planned use

⁶¹² Pacific Bell Application at 99

⁶¹³ See *Ameritech Michigan Order*, 12 FCC Rcd at 20749-50, para. 397.

⁶¹⁴ See, e.g., Vycera Comments at 23-25; AT&T Comments at 78-79

⁶¹⁵ *California Commission Order* at 249; 47 U.S.C. § 271(e)(1). Even if Pacific Bell's joint marketing plans were problematic, the California Commission is requiring Pacific Bell, among other things, to tell customers that they have the right to select the interLATA carrier of their choice, which should minimize any inherent advantage for Pacific Bell's long distance affiliate. *California Commission Order* at 251.

⁶¹⁶ See *Bell Atlantic New York Order*, 15 FCC Rcd at 4160-61, paras. 419-20

of long distance carriers' billing information and alleged unlawful monopolization practices.⁶¹⁷ We find these cases have little, if any, relevance to our analysis, both having been settled more than 5 years ago without judgments having been entered against Pacific Bell.⁶¹⁸ Therefore, despite commenters' contentions, we cannot find that Pacific Bell behaves in an anticompetitive manner such that this application fails the public interest standard.

173. Commenters also support the California Commission's finding that Pacific Bell's joint marketing plan demonstrates the possible existence of improper cross-subsidization.⁶¹⁹ As we have previously stated, the principal guarantee against improper accounting practices and cross-subsidization is section 272 of the 1996 Act, which requires compliance with certain structural safeguards. As noted above, we find that Pacific Bell will conduct its in-region long distance operation in accordance with the requirements set forth in section 272. Therefore, we cannot find that the mere possibility of improper cross-subsidization is such that this application fails the public interest standard. We will monitor Pacific Bell's performance in this area for compliance with the conditions of approval in this order."

174. Commenters also allege that Pacific Bell's role as PIC administrator would harm the long distance market. Specifically, commenters argue that the level of PIC dispute charges issued by Pacific Bell as PIC administrator (for intraLATA toll calls) were many times greater than that experienced under any other incumbent LEC.⁶²¹ In addition, these commenters point out that the number of intraLATA toll PIC disputes rose significantly once intraLATA equal access was implemented in California." Some commenters also argue that Pacific Bell abused its role as PIC administrator through improper billing and winback practices, claiming that Pacific Bell improperly coded certain winbacks as PIC disputes, even though the customer's original switch away from Pacific Bell to the competitive LEC was authorized.⁶²³ In response,

⁶¹⁷ See, e.g., Vycera Comments at 21-23; PacWest Comments at 6-8. See also **California Commission Order** at 247-48.

⁶¹⁸ Pacific Bell Application at 96-97; see also **California Commission Order** at 247-48 (recognizing that both cases were settled and no judgments were entered against Pacific Bell).

⁶¹⁹ Vycera Comments at 23-25; AT&T Comments at 76-79; PacWest Comments at 9-12

⁶²⁰ See FCC's Enforcement Bureau Establishes Section 271 Compliance Review Program, Public Notice, DA 02-1322 (rel. June 6, 2002).

⁶²¹ AT&T Comments at 79-80. Vycera argues that Pacific Bell's unique position as non-neutral primary carrier (PC) change administrator allows it to indiscriminately register alleged PC disputes against competitors as a result of winback calls and winback written materials, and to directly benefit from this by assessing PC change charges and fees against those competitors. Vycera further argues that while Pacific Bell does not allow carriers to provide evidence of customer authorization and verification to counter alleged PC disputes, Pacific Bell has nothing to lose and much to gain by registering PC disputes against carriers where none exists. See Vycera Comments at 36.

⁶²² AT&T Comments at 60; Vycera Comments at 29-31

⁶²³ Vycera Comments at 30-37; AT&T Reply Comments at 45-46. AT&T and Vycera both allege that Pacific Bell improperly coded winbacks as PIC disputes and then improperly required competitive LECs to pay the charges (continued...)

Pacific Bell argues that it has properly managed its role as PIC administrator and that its winback practices and procedures are in compliance with state and federal regulations.⁶²⁴ Pacific Bell, however, does admit that for a period of time during 1999, certain winback reply cards were incorrectly processed so as to record the winback as a PIC dispute in addition to switching the customer back to Pacific Bell.⁶²⁵ Pacific Bell explains that upon discovering this error, it notified all carriers affected by this mistake, and provided credits for any incorrect PIC dispute charges assessed.⁶²⁶ Pacific Bell also claims that it apprised the California Commission of this problem and implemented appropriate steps to minimize the likelihood of its recurrence, including the retraining of personnel involved.⁶²⁷

175. Our slamming rules do not prohibit the BOC from retaining the role of PIC administrator.⁶²⁸ Indeed, it appears to us that every BOC that has received authorizations under section 271 has continued to retain this role. We further note that the California Commission has decided to initiate an investigation into Pacific Bell's PIC administration practices, and assess whether to order the creation of an independent third-party PIC administrator.⁶²⁹ Because the California Commission has not yet decided whether to require the creation of such a third-party PIC administrator, and because this Commission's slamming proceeding is still open with Petitions for Reconsideration and Further Notice issues pending, it would be premature for us to

(Continued from previous page)

(equal to two times the PIC change fee) for customers that switched to those competitive LECs and then returned to Pacific Bell under its winback program. For instance, Vycera provides an example in which its President, Derek Gietzen, requested that his intraLATA toll service be switched from Pacific Bell to Vycera. According to Vycera, Pacific Bell sent Mr. Gietzen a winback letter and when Mr. Gietzen signed the form and agreed to switch back to Pacific Bell, Pacific Bell reponed the original switch to Vycera as an "unauthorized carrier change." Vycera Comments at 33.

⁶²⁴ Pacific Bell Reply Comments at 40-41. Pacific Bell argues that to the extent its winback practices have been investigated by the California Commission, that investigation has revealed no evidence of any pervasive or systematic mishandling of slamming claims.

⁶²⁵ Pacific Bell Wales Reply Aff. at para. 13.

⁶²⁶ Pacific Bell Wales Reply Aff. at para. 13.

⁶²⁷ Pacific Bell Wales Reply Aff. at para. 14.

⁶²⁸ **See Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes in Consumers Long Distance Carriers**, CC Docket No 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 1508, 1569-70, para. 102-103 (1998) (**Slamming Order and Further Notice**) (permitting incumbent LECs to continue to act as executing carriers under the same rules as other carriers). We note that changes to subscriber carrier selections are governed by Part 64. Subpart K of our rules, which allow the BOC to act as an "executing carrier"—the carrier that effects a change in a subscriber's telecommunications carrier. 47 C.F.R. § 64.1100 *et. seq.*

⁶²⁹ **California Commission Order** at 265. The California Commission noted that while the BOC was the presumed PIC administrator, a neutral third party may be necessary in the new environment. Furthermore, the California Commission initiated an investigation to examine the efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party PIC administrator.

conclude that the *absence* of such a third-party PIC administrator will harm the public interest.⁶³⁰ Nonetheless, the commenters have raised valid concerns with regard to Pacific Bell's conduct of its PIC administrator responsibilities for intraLATA toll service, and Pacific Bell admits that it has made mistakes improperly coding valid carrier changes away from Pacific Bell as PIC disputes. Along those lines, we note that Pacific Bell's conduct in the long distance market, including its actions as PIC administrator, will be governed by section 64.1100 *et. seq.* of the Commission's rules.⁶³¹ We find the existence of these rules, the Commission's enforcement authority, as well as the ongoing state and federal proceedings, provide assurance that Pacific Bell will be held accountable in this regard in the future. Accordingly, we cannot find that Pacific Bell's past behavior as intraLATA PIC administrator warrants a finding that grant of its section 271 application is not in the public interest.⁶³²

176. Finally, AT&T claims that the regulatory audit report issued by Overland Consulting, which we address above in the section 272 discussion, demonstrates that Pacific Bell's application is not in the public interest. Specifically, AT&T claims that the report contains repeated findings of violations, such as underreported net regulated operating revenues, and improper cross-subsidizations and suggests that Pacific Bell obstructed the work of the auditors.⁶³³ We reject AT&T's contention, however, that the Overland Report requires a finding that Pacific Bell's application is not in the public interest. As we have routinely held, our principal guarantee under the Act against improper accounting practices and cross-subsidizations is compliance with the structural and accounting safeguards of section 272. So long as Pacific Bell demonstrates that it will comply with the requirements of section 272, we do not find a sufficient public interest concern to warrant rejection of this application.

IX. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

177. Section 271(d)(6) of the Act requires Pacific Bell to continue to satisfy the "conditions required for. . . approval of its section 271 application subsequent to Commission approval of its application."⁶³⁴ Thus, the Commission has a responsibility not only to ensure that Pacific Bell complies with section 271 today, but also that it remains in compliance in the future. As the Commission has already detailed the post-approval enforcement framework and its section 271(d)(6) enforcement powers in prior orders, it is not necessary to do so here.⁶³⁵

⁶³⁰ See, e.g., *Slamming Order and Furrher Notice*, 14 FCC Rcd at 1609-10, paras. 183-84.

⁶³¹ 47 C.F.R. § 64.1100 *et seq*

⁶³² We note, that the California Commission itself provided that it is not presently prepared to require the use of a third-party PIC administrator. *California Commission Order* at 265.

⁶³³ AT&T Comments at 73-76. See *Supra* Section VII discussing Section 272 compliance.

⁶³⁴ 47 U.S.C. § 271(d)(6)

⁶³⁵ See *SWET Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, paras. 446-53. See Appendix C.

178. Working with the California Commission, we will closely monitor Pacific Bell's post-approval compliance to ensure that Pacific Bell does not "cease[] to meet the conditions required for [section 271] approval."⁶³⁶ We stand ready to exercise our various statutory enforcement powers quickly and decisively if there is evidence that market opening conditions have not been sustained.

179. In the course of this proceeding, we have given close scrutiny to Pacific Bell's provision of UNEs, as have the California Commission, the Department of Justice, and other commenters.⁶³⁷ We will closely monitor Pacific Bell's performance in California following section 271 approval. If evidence shows that performance is not maintained in these areas, we are prepared to use our authority under section 271(d)(6) to enforce compliance. As the Commission has warned, "any diminution in performance below levels deemed sufficient in this order may expose [Pacific Bell] to possible enforcement action under section 271(d)(6), including suspension of authorization to provide service."⁶³⁸

180. Consistent with prior section 271 orders, we require Pacific Bell to report to the Commission all California carrier-to-carrier performance metrics results and PIP reports, beginning with the first full month after the effective date of this Order, and for each month thereafter for one year, unless extended by the Commission. These results and reports will allow us to review Pacific Bell's performance on an ongoing basis to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Pacific Bell's entry into the California long distance market.

X. CONCLUSION

181. For the reasons discussed above, we grant Pacific Bell's application for authorization under section 271 of the Act to provide in-region, interLATA services in the State of California.

XI. ORDERING CLAUSES

182. Accordingly, IT IS ORDERED, that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 271, Pacific Bell's application to provide in-region, interLATA service in the State of California, filed September 20, 2002, IS GRANTED.

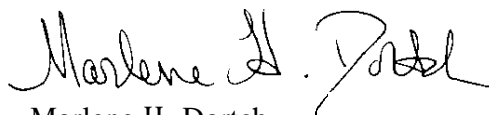
⁶³⁶ 47 U.S.C. § 271(d)(6)(A)

⁶³⁷ See generally, *California Commission Order* at 29 *et seq.*; Department of Justice Evaluation at 5; AT&T Comments at 30 *et seq.*; XO Comments at 5 *et seq.*

⁶³⁸ See *Bell Atlantic New York Order*, 15 FCC Rcd at 4176, para. 451

183. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE December 30, 2002.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch". The signature is fluid and cursive, with the first name "Marlene" being the most prominent part.

Marlene H. Dortch
Secretary